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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 667

PAUL A. GORIN, HENRY GRILLO, and SAUL GLASSMAN,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass. — Law Printers

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Petitioners respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit, entered in the above-entitled cause on September 17, 1964.

In accordance with Rule 23 (5), the petitioners file herewith a single petition, their appeals in the lower court having been heard on a printed Consolidated Record Appendix, hereinafter designated "R".

Opinion Below

There was no opinion in the United States District Court for the District of Massachusetts. The opinion of the Court of Appeals for the First Circuit is reported in 336 F.2d 211 and is annexed hereto as Appendix A.

Judgments Below

The judgments of the United States District Court for the District of Massachusetts were entered on November 18, 1963 (R. 9) and are set out at R. 495-499.

The judgments of the Court of Appeals for the First Circuit are annexed hereto as Appendix B.

Jurisdiction

The judgment sought to be reviewed is dated, and was entered, September 17, 1964.

A petition for rehearing, filed by the defendants, was denied by the Court of Appeals on October 9, 1964.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254 (1) and Rule 22 (2).

Questions Presented

1. Should the indictment have been dismissed because of prejudicial pre-indictment publicity inspired by government officials?
2. Where the evidence showed that a government agent induced the commission of the crime charged by violating federal law, should the trial court have:

    a. Granted the defendants' motions for acquittal,
    b. Stricken the evidence obtained thereby, and

c. Instructed the jury to acquit the defendants if they found that their criminal conduct was induced by the agent's violation of law?

3. Should evidence procured by the government by secret electronic transmission and recording of private conversations and by seizure of a document from a defendant at the time of his arrest have been suppressed and excluded at the trial on timely objection of the defendants?
4. Where the evidence showed that the grand and petit jurors were not selected in accordance with federal or state law, should the trial court have:

   a. Dismissed the indictment, and
   b. Stricken the panel of petit jurors?

5. Should the case of each defendant have been severed for trial because of prejudicial joinder?
6. Should the trial court have instructed the jury that the government had the burden of proving beyond a reasonable doubt that its agents did not induce the commission of the crimes charged?
7. Where there was no evidence that any of the defendants were engaged in an established pattern of criminal activity before the government agent induced the commission of the crimes charged, should the trial court have:

   a. Granted the defendants' motions for acquittal, and
   b. Instructed the jury that it could not find a lawful inducement?

8. Should the trial court have permitted the defendants to offer evidence of their lack of any criminal record on the issue of predisposition to commit the crimes charged?
9. Should the trial court have stricken overt acts committed by the defendants as a result of entrapping activities of the government agent?
10. Should the trial court have excluded evidence of bias on cross-examination of the government's principal witness?

Statutes Involved

The statutes involved in this case are 18 U.S.C. 201, 18 U.S.C. 371, 18 U.S.C. 1905, 26 U.S.C. 7213(a)(1), 26 U.S.C. 7214(a)(4), 28 U.S.C. 1861, Massachusetts General Laws, Chapter 234, Section 1, and Massachusetts General Laws, Chapter 272, Sections 99, 100, 101.

The pertinent texts of these statutes are annexed hereto as Appendix C.

Statement of the Case

On September 6, 1961, an indictment in three counts was returned against the petitioners and one other defendant, Nathaniel Bergman.[1] Count One charged all four defendants with conspiring to bribe Charles J. McCaffrey, an employee of the Treasury Department, and to defraud the United States in its governmental functions, in violation of 18 U.S.C. 371. Count Two charged all defendants except Grillo with having, on June 27, 1961, and June 28, 1961, bribed McCaffrey by giving him ten thousand (10,000.00)

[1] Bergman is not a petitioner here. He was convicted on the two counts in which he was named as a defendant and was sentenced to an eighteen-month term of imprisonment (reduced from three years).

dollars in violation of 18 U.S.C. 201. Count Three charged petitioner Grillo only, as a Treasury Department employee acting in connection with the revenue laws of the United States, with having conspired with the other three, named as co-conspirators but not as defendants, to defraud the United States in its governmental functions, in violation of 26 U.S.C. 7214(a), (4) (R. 10-16).

Each petitioner pleaded not guilty (R. 1).

Each petitioner moved to dismiss the indictment on the ground that it was returned by grand jurors calculatedly prejudiced against petitioners by governmentally inspired publicity (R. 16, 18, 19-26). These motions were supported by evidence of newspaper articles, marked Exhibit A, (R. 25) dated Saturday, August 26, Sunday, August 27, and Monday, August 28, 1961, respectively. In these articles, Attorney General Robert Kennedy was quoted as saying:

> "The case was investigated vigorously and skillfully by the Inspection Service of the Internal Revenue Service. Actions of (I.R.S. Commr. Mortimer) Caplin and the men of the Inspection Service reflect the integrity of the Internal Revenue Service and are in the highest tradition of the Federal Service.
>
> "Mr. McCaffrey is a courageous American and typifies the loyalty and integrity of the men of the Internal Revenue Service."

Nine days after publication of the last article complained of, the petitioners were indicted.

In addition, each petitioner, in a joint motion, moved to dismiss the indictment on the ground that the list from which was drawn the grand jury which returned the indictment was drawn contrary to law (R. 31-32). Evidence adduced in support of this motion established that the

grand jurors were selected by the jury commissioners of the United States District Court for the District of Massachusetts from the jury lists of the various cities and towns in Massachusetts. The Boston Election Commission, which is charged with the annual preparation of jury lists for the City of Boston, selected jurors solely from the lists of registered voters in the various wards of the city. Then, by reference to the list of inhabitants prepared annually by the city police department, the Commission eliminated those exempt from jury service by the General Laws of Massachusetts, Chapter 234, Section 1 (R. 502-3).

On the same grounds, the petitioners moved to strike the jury panel from which was drawn the petit jury at their trial. (R. 32-33).

Separate motions for severance were also filed by each petitioner (R. 16-17, 18-19, 26-28).

Finally, in joint motions, each petitioner seasonably moved (1) to suppress evidence obtained from a document which was taken from the person of the petitioner Glassman shortly after his arrest (R. 29) and (2) to suppress certain evidence obtained by mechanical or electronic means (R. 29-30).

With respect to the motion relating to the document taken from Glassman's person, there was evidence tending to show that, on August 26, 1961, Inspector Richard Callahan served a warrant of arrest on Glassman. Shortly thereafter, at the office of the United States Marshal, Glassman was asked to put all his personal effects on a desk. In addition, he was instructed to empty the contents of his wallet onto the desk. After Glassman complied, Callahan could see that there were still papers in the wallet and requested Glassman to let him see them. Glassman stated that they were personal papers and unimportant. When Callahan stated that he wanted to see them anyway, Glassman produced them. Among them was a yellow piece of

paper containing figures and writing. Callahan thereupon copied the contents of the paper onto another piece of paper and returned the original to Glassman. The Court admitted the copy made by Callahan as Exhibit 36. The paper purportedly constitutes a record of the financial agreement, and payments made thereunder, by and between Bergman, Glassman and Gorin (R. 82-89).

With respect to the motion relating to the listening devices, it was stipulated that the devices were used without the permission of any court or of any agent of the Commonwealth of Massachusetts and without the permission of any of the defendants, but with the permission of Charles J. McCaffrey (R. 30-31). The facts relating to the use of these devices are hereinafter set forth.

All the above-described motions were denied by the trial court.

On February 20, 1963, the Court of Appeals vacated judgments of conviction entered on March 19, 1962, and remanded the case for a new trial. On June 3, 1963, this Court denied the defendants' petition for a writ of certiorari.

The petitioners were tried for the second time beginning October 1, 1963, and convicted on October 31, 1963. Judgments of conviction were entered on November 18, 1963. The petitioners' petition for rehearing was denied by the Court of Appeals on October 9, 1964.

The evidence adduced at the trial tended to prove the following facts:

The tax returns of the defendant Nathaniel Bergman, a Hartford attorney, had been under investigation by the Intelligence Unit of the Hartford District Office of the Internal Revenue Service since June, 1959. Bergman retained a Hartford attorney, one Hurney, to represent him. Some time before June, 1961, when the case was about to come under the jurisdiction of the Boston Regional Office

of the Internal Revenue Service, the petitioner Paul Gorin, who practiced law in Boston, was retained to act as co-counsel.

On May 1, 1961, the case arrived at the Boston Regional Office of John Deneen, Assistant Regional Commissioner, Intelligence. At the time, Deneen's Executive Assistant was the petitioner Henry Grillo. In Deneen's absence, his duties were assumed by Grillo. There was nothing unusual about the conduct of the case while pending in Deneen's office (R. 38).

On May 24, the case was forwarded to Charles J. McCaffrey, Chief of Enforcement in the Office of Regional Counsel, Boston (R. 37).

On May 25, McCaffrey received the case and assigned it for review to an attorney named Griffin (R. 127, 135-136).

McCaffrey and the petitioner Saul Glassman, a Boston attorney, had known each other since March, 1960, when they joined a United States Marine Corps Reserve voluntary training unit (VTU) consisting of reserve officers who were lawyers. Early during their acquaintance, Glassman told McCaffrey that he specialized in real estate matters. McCaffrey stated that the practice of a tax specialist was very lucrative. He suggested that Glassman take courses in tax law and, generally, that he look into the possibilities of a tax practice (R. 130-133).

Sometime in March, 1961, when Glassman mentioned an impending trip to Europe, McCaffrey commented that government employees with large families find it difficult to save money (R. 138).

Up to May 31, 1961, Glassman never had discussed any case in Enforcement with McCaffrey and McCaffrey had no reason to doubt Glassman's honesty and integrity (R. 144).

On that day, May 31, 1961, Glassman called McCaffrey and said that he wanted to talk with McCaffrey about a

case in McCaffrey's office and would see him at the TU meeting that night (R. 142-143). The call made McCaffrey "uneasy" and, on the spur of the moment, he stated that he did not intend to go to the meeting that night (R. 144-145). Glassman said he would call the next morning, to which McCaffrey replied, "All right" (R. 143). Immediately after the call, McCaffrey called in an attorney named Markham and asked him to make a record of the call (R. 144).

At the time that he stated that it would be "all right" for Glassman to call the next morning, McCaffrey knew that it would be improper to discuss any case with Glassman, because he knew that Glassman did not have a Treasury Card or a power of attorney in any case in the Regional Counsel's office (R. 147-148).

On the same day, May 31, McCaffrey signed the name of his immediate superior, John Edwards, to a letter addressed to Gorin, in which it was suggested that a conference on the Bergman case be held on June 13 (R. 140-141, 369, 407).

The next day, June 1, Glassman called McCaffrey and requested a conference (R. 150). McCaffrey said:

> "What is the name of the case so I can get the files and refresh my recollection about the case?" (R. 152)

Glassman thereupon identified it as the Bergman case (R. 150). At this point, McCaffrey knew that Gorin was the counsel of record in the case (R. 152).

At the conference of June 1, McCaffrey, in conceded violation of Treasury propriety (R. 147) and policy (R. 336), disclosed to Glassman the approximate amounts of the civil deficiencies, the opening and closing net worth figures, and that Bergman had some 248 savings bank accounts (R. 334-335). Glassman closed the conference with

the comment that, in a case of such magnitude, "there is enough of a fee in it for all of us." McCaffrey thereupon reported the conversation to his immediate superior, John Edwards (R. 167). Since the "us" could have referred to the three attorneys in the case (Glassman, Gorin, and Hurney), McCaffrey and Edwards did nothing further in the matter (R. 167, 171).

Sometime between May 31 and June 13, Gorin spoke to McCaffrey and obtained an extension of time for the conference to July 6. McCaffrey did not mention that he had talked to Glassman about the case (R. 369, 407).

On June 6, McCaffrey called Glassman and went to Glassman's office on VTU business. Glassman mentioned that he expected a visit from a friend of Bergman and would get in touch with McCaffrey later.

On June 8, McCaffrey and Glassman were together at a VTU meeting, but there was no discussion of the Bergman case (R. 167).

On the night of June 14, McCaffrey and Glassman met at a VTU meeting. After the meeting, McCaffrey asked Glassman for a ride to South Station. On this occasion, Glassman mentioned his fee in the Bergman case (R. 175-176). He stated that he had told Bergman's friend that he wanted $35,000 if the case were killed in McCaffrey's office and that the money would have to be put in escrow.

On the following morning, June 15, McCaffrey reported the conversation of the evening before to his superior, Edwards. As a result of his talk with Edwards, the matter was reported to the Regional Inspector on the same day (R. 177). Shortly thereafter, McCaffrey met with an Inspector named Kiely (R. 184).

On June 20, McCaffrey telephoned Glassman. One purpose of the call was to inquire whether Glassman was going to the VTU meeting the following night. The other purpose was to inform Glassman that he, McCaffrey, had had

the Bergman case transferred back to him. Glassman said, "Wonderful" and asked to come over, to which McCaffrey acquiesced (R. 188-189).

Just prior to this conversation, Inspector Kiely had installed a radio transmitter in a drawer of McCaffrey's desk (R. 75).

At McCaffrey's office, McCaffrey said:

> "I've had the case transferred to me because I'll have better control of it." (R. 190)

The transfer of the case to McCaffrey was in accordance with Kiely's instructions (R. 66).

There was another discussion about Glassman's fee and McCaffrey observed that the fee was about ten per cent of the tax deficiency (R. 192). McCaffrey then said:

> "We know what we are talking about. Let's lay it on the line. What do you have in mind for me?" (R. 193)

Up to that point, Glassman had not offered McCaffrey a bribe (R. 192). In response to McCaffrey's question, Glassman said:

> "Whatever you think."

Subsequently, in the same conversation, Glassman stated that McCaffrey would get between ten and fifteen thousand dollars, to which McCaffrey responded that it was more money than he had ever had in his life (R. 195). McCaffrey suggested that the money be in small bills. The conversation about payments of money to McCaffrey was consistent with Inspector Kiely's instructions to McCaffrey (R. 66).

On the following night, June 21, McCaffrey drove up to the building where the VTU meeting was to be held. When he saw Glassman, he called and beckoned him over to his car (R. 196), in which an electronic recording device had been installed (R. 76-77). McCaffrey stated that he would have a Criminal Action Memorandum (CAM) recommending no criminal prosecution drawn in the rough by the following Tuesday, June 27 (R. 197, 340). When Glassman said, "So soon?" McCaffrey replied

> "Well, Saul, here's the point: If they are going to stall, I can't do it. I mean I don't want to draw attention to the case by an unusual number of postponements." (R. 340)

McCaffrey said also that "the fastest way is the best way" (R. 199) and inquired from whom he would receive the money (R. 200).

The two men then left the automobile and entered the Marine Corps Building. McCaffrey later motioned Glassman out to the rear porch and asked:

> "Do you or anyone else want to review the CAM?" (R. 344-345)

At the time, McCaffrey had in mind that Gorin would be a potential observer of the CAM. McCaffrey knew that a CAM should not be shown to unauthorized persons and that it would be unusual for a private lawyer to see a CAM (R. 345-346).

Glassman responded by saying that he would, himself, review the CAM. McCaffrey then stated that he would bring a copy of the CAM to Glassman's office on the following Tuesday, June 27 (R. 346).

On the next day, June 22, McCaffrey telephoned Glass-

man to confirm their appointment for the following Tuesday (R. 201).

On June 27, McCaffrey brought to Glassman a rough draft of the CAM (R. 346) and asked him to read it over (R. 208). When Glassman asked about the advisability of a conference with Gorin, McCaffrey "suggested" a back-dated letter from Gorin (R. 205), stating:

> "Just a minute. I'll shoot you a copy. For (blank) sake, be careful with it. If this gets out, there is only one man that let it out, and that's me. Now, here's the point. Let him look at the copy, go over it, write me a back-dated letter." (R. 346)

The purpose of the letter was to make the record appear that the CAM was based on information received from Bergman's attorney (R. 205-206). This is the same back-dated letter which is charged in Overt Act No. 3 as having been written by Gorin (R. 347).

Then, referring to the CAM McCaffrey said:

> "Do you have a photostatic machine here in the office? Why don't you have the girl run it off now?" (R. 350)

The photostat thus made is the same one which is charged in Overt Act No. 2 as having been made by Glassman (R. 351).

During the course of the meeting of June 27, Glassman paid McCaffrey $5,000 (R. 203). Also during the meeting, Glassman stated that Grillo had been approached and was ready for the arrival of the CAM at the office of Regional Intelligence. Glassman also stated that Gorin was "O.K." (R. 350).

On June 28, McCaffrey went to Glassman's office again and was given the second, and final, installment of $5,000.

On this occasion, he delivered to Glassman the smooth copy of the CAM (R. 211). At this point, each man had done all he promised under the agreement (R. 351-352) and the alleged bribery was complete (R. 408).

On July 7, McCaffrey called Glassman to tell him that he had received "howls" from Mr. Deneen, Grillo's superior, concerning the CAM (R. 213, 354.)

On July 10, McCaffrey visited Glassman's office and was given the back-dated letter signed by Gorin as originally suggested by McCaffrey. At this time, McCaffrey said to Glassman:

> "I hear that Deneen is away on vacation. In his absence then, Grillo is the man. It is time for him to act." (R 355).

During the course of this same conference, McCaffrey said:

> "I think I have done all I promised to do. If I can be of any help let me know" (R. 356).

At that conference also, Glassman said:

> "If the CAM doesn't go through, I'm not unhappy." (R. 356)

McCaffrey responded:

> "Well, I am in a way" (R. 356).

On returning to his office, McCaffrey found a letter just received from one Murphy, Chief of Intelligence in the Hartford District Office, to the effect that Murphy intended to file a vigorous protest to the CAM. The letter had been

forwarded through the office of Regional Intelligence and bore the signature of Grillo indicating his approval (R. 230, 357). In spite of Glassman's prior statement that he would not be unhappy if the CAM were overturned (R. 358-359), McCaffrey, with the concurrence of the Government investigators, called Glassman to advise him of the receipt of the letter (R. 357-359).

In the evening of July 11, electronic listening equipment was installed in McCaffrey's office and, during the evenings of July 11 and 12, in Grillo's office (R. 90).

On July 13, McCaffrey called Grillo directly, broached the subject of the Bergman case, and invited Grillo over to see his new offices. The call, however, failed to evoke action by Grillo (R. 360). This was the first conversation between McCaffrey and Grillo about the Bergman case (R. 408).

On the next day, July 14, McCaffrey received a letter from Gorin's co-counsel of record, Hurney, inquiring as to the result of the conference originally scheduled for June 13 and then rescheduled for July 6 (R. 369-370). McCaffrey did not "think of" the obvious reply to the Hurney letter; that is, to advise Hurney that the conference of July 6 had been cancelled in accordance with a letter from Gorin dated June 15 (R. 370). Instead, McCaffrey and the Government investigators determined that "the only logical person to talk to about it would be Gorin" (R. 364).

On July 18, in "preparation" for a meeting between McCaffrey and Gorin, which did not take place until July 20, microphones were installed in McCaffrey's office with wires leading to a receiver and tape recorder located in a nearby utility closet (R. 77-78).

In the morning of July 19, McCaffrey called Glassman and asked whether he ought to bring the Hurney letter with him to the VTU meeting of that evening, to which

Glassman replied in the affirmative (R. 217). McCaffrey also called Grillo that morning and invited him to visit McCaffrey's new offices. This call to Grillo also produced no results (R. 249-250).

In the evening of July 19, at the VTU meeting, Glassman, after being invited by McCaffrey into the cloak room, delivered to McCaffrey a legal brief from Gorin (R. 220) and was shown the Hurney letter (R. 218). Then McCaffrey, subtly suggesting that he call Gorin directly, said, with reference to the letter:

> "I'm a little bit upset about it because it has come in through the front office. It has been handstamped and logged in. My first impulse was to call Gorin and be a little indignant about it and ask him, 'Aren't the co-counsel speaking to one another?' " (R. 365).

This was the first statement made by anyone in any form of words which made reference to a call to Gorin (R. 365). When Glassman approved of the call, McCaffrey said:

> "Well, all right. If there is no objection I will call him" (R. 366).

Moreover, with reference to his intended call to Gorin concerning the Hurney letter, McCaffrey said to Glassman:

> "And Gorin, I hope, will say, 'Look, Mac, I'll take care of it.' " (R. 367).

McCaffrey conceded that he "encouraged," "wanted," and "expected" Gorin to take some action in reference to the Hurney letter (R. 368-369).

Then, on the morning of July 20, McCaffrey telephoned Gorin directly (R. 373-374).

There then followed a series of meetings between Gorin and McCaffrey on July 20, July 25, July 27, August 1, August 3, August 8, and the morning of August 14. These were followed by meetings between McCaffrey, Gorin, and Bergman in the evening of August 14 and again in the morning of August 15. On the latter date, Grillo joined the meeting, but only during Bergman's temporary absence.

During the course of these conferences, Gorin was drawn quickly and surely into the original McCaffrey-Glassman conspiracy. On two occasions, in response to direct inquiries from McCaffrey, in Bergman's presence, Gorin stated that he had paid Grillo $1500 (R. 389-390).

On July 20, at the first McCaffrey-Gorin conference, Gorin asked McCaffrey what he wanted done concerning the Hurney letter. McCaffrey suggested that Gorin obtain an exclusive power of attorney.

On July 25, as a direct result of McCaffrey's suggestion, Gorin delivered to McCaffrey a revocation of the power of attorney of both himself and Hurney (R. 376).

On July 27, Gorin invited McCaffrey golfing. The day began with a complaint by McCaffrey that his golf clubs were dilapidated and ended with Gorin's having given McCaffrey a new bag and set of clubs (R. 376).

On August 1, McCaffrey was Gorin's luncheon guest at a Boston restaurant and, on August 3, Gorin visited McCaffrey's office (R. 377).

On August 8, from a suburban Boston golf course, Gorin returned a call from McCaffrey to Gorin's office. McCaffrey had received instructions to go to Washington concerning a certain Goldfine civil tax case and suggested to Gorin that he might also be interested in the matter. McCaffrey said that Gorin would have to come in that day or not at all because McCaffrey was required to leave for Washington that very afternoon. To Gorin's excuse that he was at a golf course, McCaffrey urged that Gorin take a taxi. To

Gorin's excuses that he was dressed in golf shorts and unshaven, McCaffrey responded that that would not make any difference (R. 381-383, 392-393).

Gorin finally relented and came to McCaffrey's office on that day. Thereupon, McCaffrey, to Gorin's statement that the case was "important," responded by saying:

> "I know it's important but is it valuable?" (R. 383)

Apparently, nothing further was done on the matter by either McCaffrey or Gorin.

Similarly, other conversations between McCaffrey and Gorin concerning other cases that would be coming into McCaffrey's office never developed beyond the talking stage.

On August 10, McCaffrey again called Gorin's office. Gorin returned the call from a hotel in New Hampshire. That evening, Gorin called McCaffrey to inquire about the official protest of Intelligence to the CAM. McCaffrey stated that it was a formidable protest and that it might be necessary to get together with Grillo. Gorin said that he would visit McCaffrey the following Monday, August 14 (R. 384-385).

In the morning of August 14, Gorin arrived at McCaffrey's office. McCaffrey was critical of Grillo's inactivity in "watering down" the protest (R. 385). When Gorin offered to call Bergman in order to obtain additional information requested by McCaffrey, McCaffrey asked:

> "How about Grillo?" (R. 385).

McCaffrey then called Grillo and turned the telephone over to Gorin, who requested Grillo to come to McCaffrey's office. Grillo stated that he could not come (R. 278, 385-386).

In the evening of the same day, August 14, Bergman joined McCaffrey and Gorin. During the course of the

evening, McCaffrey made repeated references to the need for persuading Grillo both to confer with McCaffrey concerning the protest and to take some favorable action in the case at the Office of Regional Intelligence (R. 269-278).

On the next day, August 15, Grillo was finally drawn into a conference with McCaffrey and Gorin. This is the same conference which is charged as Overt Act No. 9 and which McCaffrey testified he tried in every way he could to bring about (R. 387).

Prior to the conference, McCaffrey had called Grillo. When Grillo returned the call, McCaffrey turned the telephone over to Gorin, who asked Grillo to come to McCaffrey's office. Grillo asked to speak to McCaffrey and informed him that he could not come until 10:30 A.M. (R. 287-289). McCaffrey at no time informed Grillo that Gorin was no longer Bergman's attorney of record (R. 303).

During the conference at McCaffrey's office, McCaffrey made the direct request of Grillo to "straighten this case out" in Deneen's absence. Grillo refused, stating that he would get into serious difficulty (R. 308). Grillo made other statements which were sympathetic with the stated desires of McCaffrey and Gorin to override the protest to the CAM (R. 309-312).

Also during the course of this conference, McCaffrey offered to Bergman a copy of the Special Agent's Report and handed it to Gorin, who accepted it. This is the same report which is charged in Overt Act No. 10 as having been "requested" by Bergman. McCaffrey testified that the Act as charged is incorrect (R. 390-391).

Electronic listening devices, by which conversations were monitored and/or recorded, were used by the Government as follows:

June 20, McCaffrey-Glassman, at McCaffrey's office: Fargo radio transmitter placed in McCaffrey's desk. Radio receiver and tape recorder placed in nearby utility closet.

Conversation monitored by Inspector Kiely and testified to by him (R. 39-41).

June 21, McCaffrey-Glassman, in McCaffrey's automobile and in Marine Corps Reserve building: Fargo radio transmitter placed in McCaffrey's automobile. Receiver and recorder placed in Government vehicle (R. 44-45, 76-77). Minifon wire recorder placed on McCaffrey's person (R. 46). Conversation in automobile monitored by Inspector Kiely and testified to by him (R. 44-45). Wire recording of conversation in automobile and in building played to jury (R. 91-97).

June 27, McCaffrey-Glassman, at Glassman's office: Kell radio transmitter and Minifon wire recorder placed on McCaffrey's person. Receiver and recorder placed directly across the street. Conversation monitored by Inspector Kiely and testified to by him (R. 47-48). Wire recording played to jury (R. 97-109).

June 28, McCaffrey-Glassman, at Glassman's office: Same devices as on June 27 (R. 49, 77). Wire recording played to jury (R. 109-110).

July 10, McCaffrey-Glassman, at Glassman's office: Minifon wire recorder placed on McCaffrey's person (R. 50).

July 19, McCaffrey-Glassman, at the Charlestown Officers Club: Minifon wire recorder placed on McCaffrey's person (R. 51-52).

July 20, McCaffrey-Gorin, at McCaffrey's office: On July 18, dynamic microphone placed behind the radiator with wires leading to a nearby utility closet where a tape recorder was located. Conversation monitored by Inspectors Kiely and Callahan and testified to by both Inspectors (R. 52-54, 77-78).

July 25, McCaffrey-Gorin, at Children's Hospital: Minifon wire recorder placed on McCaffrey's person (R. 55-56).

July 27, McCaffrey-Gorin, at Blue Hills Country Club: Minifon wire recorder placed in bag owned by McCaffrey, but no recording made (R. 56-57).

August 1, McCaffrey-Gorin, at Gorin's office and Yankee Fisherman restaurant: Minifon wire recorder placed on McCaffrey's person (R. 57-58).

August 3, McCaffrey-Gorin, at McCaffrey's office: Dynamic microphone, originally placed behind radiator on July 18 in preparation for July 20 conference, remained in place, with cable leading to recorder in nearby utility closet. Conversation monitored by Inspectors Kiely and Callahan in utility closet and testified to by both Inspectors (R. 58-59, 78-79).

August 8, McCaffrey-Gorin, at McCaffrey's office: Dynamic microphone behind radiator leading to recorder in utility closet. Conversation monitored by Inspectors Kiely and Callahan in utility closet and testified to by both Inspectors (R. 59-60, 79-80). Tape recording played to jury (R. 394-398).

August 14 (A.M.), McCaffrey-Gorin, at McCaffrey's office: Dynamic microphone leading to recorder in utility closet. Conversation monitored by Inspectors Kiely and Howard in closet and testified to by Kiely (R. 61-62).

August 14 (P.M.), McCaffrey-Gorin-Bergman, at McCaffrey's office and the Yankee Fisherman Restaurant: Dynamic microphone leading to recorder in utility closet. Minifon wire recorder placed on McCaffrey's person. Conversation in McCaffrey's office monitored by Inspector Kiely in utility closet and testified to by him (R. 62-64).

August 15, (1) McCaffrey-Gorin-Bergman, (2) McCaffrey-Gorin-Grillo, and (3) McCaffrey-Gorin-Bergman, all at McCaffrey's office: Dynamic microphone leading to recorder in utility closet. All three conversations monitored by Inspector Callahan and testified to by him (R. 64, 80-81). Tape recording played to jury (R. 110-119).

Anent the conversations in McCaffrey's office, a battery operated tape recorder and extension microphone had been placed in McCaffrey's desk on July 11 and remained in place until about August 15 (R. 75). Apparently no tapes were made from this recorder; at any rate, none was introduced.

In addition to the conferences outlined above, Grillo's part of a telephone conversation, on August 15, with Gorin was recorded by means of a microphone in Grillo's government office, leading to a tape recorder in another building. Grillo's part of the conversation was monitored by Inspector John Buckley and testified to by him (R. 401-404).

Certain other telephone conversations, to which McCaffrey was a party, were recorded on McCaffrey's end only.

Although not all recordings were played in open court for the jury, all were introduced in evidence and the jury was told that the Court would order played any other recordings the jury might wish.

Reasons for Granting the Writ

1. THE COURT OF APPEALS HAS DECIDED THREE IMPORTANT QUESTIONS PERTAINING TO THE PERMISSIBLE CONDUCT OF OFFICERS AND AGENTS OF THE UNITED STATES IN CRIMINAL PROSECUTIONS WHICH SERIOUSLY AFFECT THE PETITIONERS' CONSTITUTIONAL RIGHTS.

   a. *In holding that pre-indictment publicity inspired by government officials did not warrant dismissal of the indictments, the Court of Appeals decided an important question of federal law in a manner not in conformity with the decision of this Court.*

Each of the petitioners moved to dismiss the indictment on the ground that it was returned by grand jurors calcu-

latedly prejudiced against them by publicity directly inspired by Government officials (R. 16, 18, 19-26).

Government officials issued a news release just before the Government's principal witness, McCaffrey, was scheduled to testify before the grand jury. In that release, the Attorney General of the United States placed his imprimatur upon the courage, honesty, and loyalty of McCaffrey. The news release, as could have been anticipated, was carried in newspapers published throughout Massachusetts.

Petitioners' contention is that there is a right under the Fifth Amendment to the Federal Constitution to be indicted, if at all, by grand jurors free of calculated,[1] governmentally instigated prejudice or that proper standards for the enforcement of the criminal law in the federal courts sanction only indictments by a grand jury uninfluenced by improper forces generated by the prosecutor.

At the outset, it should be noted that neither *Beck* v. *Washington*, 369 U.S. 541, 82 S. Ct. 955; nor *Geagan* v. *Gavin*, C.A. 1, 292 F.2d 244, cert. denied, 370 U.S. 903, 82 S. Ct. 1247, foreclose petitioners' contention Not only did both of these cases deal merely with the minimum requirements of the Due Process Clause of the Fourteenth Amendment, but *Beck* left unanswered the question of whether a state prisoner has a federal constitutional right to have charges against him considered by a fair and impartial grand jury.[2] The four members of the *Beck* majority, while indicating that it might be that "the Due Process Clause

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[1] In the sense meant by Frankfurter, J., dissenting, in *In re Sawyer*, 360 U.S. 622, 664, when he asked, "Even though the (prosecutor) may not have had a provable desire, the specific intent, to affect the pending trial and its outcome, are we really required to attribute to the (prosecutor) a child-like unawareness of the inevitability that (his) remarks would be reported and find their way to judge or jury, as they did?"

[2] The Court, however, in affirming *Geagan* v. *Gavin*, 181 F. Supp. 466, decided that there was no such right.

of the Fourteenth Amendment require(s) (a) . . . State, having once resorted to a grand jury procedure, to furnish an unbiased grand jury," intentionally avoided the question by concluding that the State of Washington, so far as was shown by the record, did supply an unbiased grand jury in that case. 369 U.S. at page 546, 82 S. Ct. at page 958. Two members of the minority, Mr. Justice Black, with whom the Chief Justice concurred, assumed "the right of defendants to fair and impartial grand jurors." 369 U.S. at page 559, 82 S. Ct. at page 965. The third dissenter, Mr. Justice Douglas, said, "*It is well-settled that when either the Federal Government or a State uses a grand jury, the accused is entitled to those procedures which will insure, so far as possible, that the grand jury selected is fair and impartial.*" 369 U.S. at page 579, 82 S. Ct. at page 975. See also *Cassell* v. *Texas*, 339 U.S. 282, 70 S. Ct. 629; *Michel* v. *Louisiana*, 350 U.S. 91, 102-104, 76 S. Ct. 158, 165-166. (Italics supplied.)

That there is such a right or standard, as petitioners claim under the Fifth Amendment or urge under the supervisory powers of the federal courts, seems clear.

The Fifth Amendment to the Federal Constitution not only requires federal prosecutions for serious crimes to be instituted by indictment, but also guarantees due process of law to all federal prisoners. It must have been those provisions of the Fifth Amendment which this Court adverted to in *Costello* v. *United States*, 350 U.S. 359, 363, 364, 76 S. Ct. 406, 409 and *Lawn* v. *United States*, 355 U.S. 339, 349, 78 S. Ct. 311, 317, when it said in effect that the Fifth Amendment requires that an indictment be returned not only by a legally constituted grand jury, but also by an unbiased grand jury. Cf. *Beck* v. *Washington*, 369 U.S. 541, 546, 82 S. Ct. 955, 958.

If, contrary to the view of the Court of Appeals for the

First Circuit,[3] the Due Process Clause of the Fourteenth Amendment should ultimately be held to require an unbiased grand jury, then the Due Process Clause of the Fifth Amendment must be construed to impose at least the same requirement. It would be frivolous to suppose that "due process of law" meant one thing under the Fourteenth Amendment and something less under the Fifth Amendment. Cf. *Fournier* v. *People*, C.A. 1, 281 F.2d 888, 891 (footnote); Frankfurter, J., concurring, in *Malinski* v. *New York*, 324 U.S. 401, 415, 65 S. Ct. 781, 788.

Finally, the notion that a prosecutor may purposely prejudice a grand jury with immunity is certainly a concept that is foreign to our standards of decency and fairness. As was said in *Costello* v. *United States*, 350 U.S. 359, 362, 76 S. Ct. 406, 408, the very purpose of the grand jury procedure is "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes."

Its object, according to *Stirone* v. *United States*, 361 U.S. 212, 218, 80 S. Ct. 270, 273, is to limit a person's jeopardy "to offences charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge". It was "designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, *but also as a means of protecting the citizen against unfounded accusation, whether it comes from government*, or be prompted by partisan passion or private enmity." *Ex parte Bain*, 121 U.S. 1, 11, 7 S. Ct. 781, 786. "The most valuable function of the grand jury (has been) not only to examine into the commission of crimes, *but to stand between the prosecutor and the accused.*" *Hale* v. *Henkel*, 201 U.S. 43, 59, 26 S. Ct. 370, 373. See also *Costello* v. *United States*, 350 U.S. 359, 362, 76 S. Ct. 406, 408; 2

[3] As expressed in *Geagan* v. *Gavin*, 292 F.2d 244, *cert. denied*, 370 U.S. 903, 82 S. Ct. 1247, affirming 181 F. Supp. 466.

Wharton, Criminal Procedure (1918) 1757; 38 C.J.S. 983. (Italics supplied.)

The jealousy with which this safeguard has been preserved is well demonstrated by the following cases, in each of which the conviction was reversed because of the prosecutor's improper influence upon the deliberations of the grand jury. *United States* v. *Wells*, D. Idaho, 163 Fed. 313, 325-327; *Williams* v. *State*, 188 Ind. 283, 303-307; *Blake* v. *State*, 54 Okl. Cr. 62, 14 P.2d 240; *Hammers* v. *State*, Okl., 337 P.2d 1097. See also *Attorney General* v. *Pelletier*, 240 Mass. 264, 307-310, 134 N.E. 407, 419; 38 C.J.S. 1042.

To permit the prosecutor to influence a grand jury by prejudicial publicity, calculatedly issued or initiated by him, would make a mockery of the very purpose of the grand jury procedure. It would reduce that procedure to a mere sham or pretense.

This Court has squarely held that the securing of a guilty verdict by the intentional use of perjured testimony, *Mooney* v. *Holohan*, 294 U.S. 103, 55 S. Ct. 340; *Napue* v. *State of Illinois*, 360 U.S. 264, 79 S. Ct. 1173, or by intimidation, *Frank* v. *Mangum*, 237 U.S. 309, 35 S. Ct. 522, or by massive publicity, *Irvin* v. *Dowd*, 359 U.S. 394, 79 S. Ct. 825; 81 S. Ct. 1639, stimulated by the prosecutor, is constitutionally abhorrent.[4]

In any event the issue here presented is not limited to the rock-bottom requirements of the Due Process Clause of either the Fifth or Fourteenth Amendments. As this Court stated in *McNabb* v. *United States*, 318 U.S. 332, 340, 63 S. Ct. 608, 613, "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards

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[4] Even under the Fourteenth Amendment.

for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

b. *The Court of Appeals erred in affirming the trial court's denial of the Petitioners' Motions for Judgment of Acquittal, Refusal to Strike evidence obtained by violation of law and refusal to instruct the jury that the Petitioners should be acquitted if their commissions of crime were the result of McCaffrey's violations of law.*

The evidence adduced at the trial established that McCaffrey on June 1 disclosed confidential information concerning the Bergman case to Glassman knowing Glassman did not have a power of attorney from the taxpayer and that he did not even have a Treasury card (R. 147-148, 334-336). Such disclosures were clearly in violation of 26 U.S.C. 7213(a)(1) and 18 U.S.C. 1905 and pertinent I.R.S. regulations.

The petitioners moved to strike the evidence that was unlawfully obtained thereby and duly objected to the denial of their motions (R. 405-406, 408-410); requested the Court to instruct the jury that if they found that the defendants' commission of the alleged crimes were induced by McCaffrey's violation of law they should acquit the defendants; and made specific objection to the Court's refusal to so instruct the jury (R. 452-455, 456, 461, 483-484).

The only logical inference to be drawn from the fact of this unlawful disclosure by McCaffrey was that McCaffrey intended to induce Glassman to proceed with whatever plans Glassman might have or might develop which McCaffrey speculated were, or might become, unlawful and improper.

The information disclosed from confidential files was essential to Glassman's becoming involved in any future

proceedings, since the information enabled Glassman to convince Gorin, the attorney for Bergman, that Glassman had a direct pipeline into the files of the Enforcement Division. Glassman's otherwise unexplained possession of the information would enable him to demonstrate to the taxpayer or the attorney for the taxpayer that Glassman had a friend in the Enforcement Division and that his supposed friend had already proven a willingness to violate the law to help Glassman.

The conclusion is inescapable that McCaffrey disclosed the information from the Bergman file to Glassman for the purpose of leading Glassman down the path to whatever *other* unlawful conduct might reasonably be expected to follow.

And, as intended, Glassman did pass along his newly acquired confidential information to Gorin, who was duly impressed with the fact that Glassman had access to such confidential information. Gorin in turn told Bergman that Glassman must have a good friend in Enforcement, since he otherwise could not have known what he knew.

This persuaded Bergman to engage the services of Glassman to look into the matter further, and eventually led to McCaffrey's demand for payment and Glassman's agreement thereto.

McCaffrey's intentional violation of the law thus was a key and an essential step in the chain of events leading to the conspiracy, and to payment of the purported bribe to McCaffrey, for which the defendants here were tried. And McCaffrey, by his own testimony, never intended to take a bribe for himself but rather intended to enforce the law.

This Court has firmly established the policy that government agents shall not violate the law in order to enforce the law.

It was aptly said by Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928):

> "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."

Further, at 485:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously . . . Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justified the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."[5]

In fact, evidence obtained by illegal practices is uniformly excluded from use at a subsequent trial.

In *Spano* v. *New York*, 360 U.S. 315 (1959), a state court conviction based on a confession obtained by unfair methods was reversed. The defendant had turned himself in to the police, was represented by an attorney, and refused to answer questions. Nevertheless the police persisted in questioning him for a period of several hours and eventually obtained a confession by using one Bruno, a police officer and a childhood friend of the defendant, to play upon his sympathies by the use of false statements. Of such practices this Court said at 320:

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[5] Quoted in part with approval in *Mapp* v. *Ohio*, 367 U.S. 643, 659 (1961).

> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

With reference to the conduct of Bruno, this Court also noted, at 323:

> "Petitioner was apparently unaware of John Gay's famous couplet:
>
> 'An open foe may prove a curse,
> But a pretended friend is worse,'
>
> and he yielded to his false friend's entreaties."

In the present case McCaffrey, a pretended friend of Glassman, indeed proved to be worse than a curse. He deliberately violated the laws he was bound to uphold for the purpose of causing his "cordial acquaintance" to embark upon and carry out a plan resulting in a heavy fine, a jail sentence, ignominy and disgrace.

While the courts do not enforce the common moral and ethical obligations of friendship, the courts do and should insist that no government agent should *violate the law* to betray a friend—or a cordial acquaintance.

In *Benanti* v. *United States*, 355 U.S. 96 (1957) this Court held that evidence obtained by state law enforcement officers by means of illegal wiretapping could not be used to secure a federal conviction, stating at 102:

> "Although state agents committed the wiretap, we are presented with a federal conviction brought about in part by a violation of federal law, in this case in a federal court."

The quoted passage applies with equal effect to the present case, except that McCaffrey was a federal agent. *Cf. Nardone* v. *United States*, 302 U.S. 379, 383 (1937) (evidence obtained by illegal wiretapping by federal agents not admissible in federal court).

In *Rea* v. *United States*, 350 U.S. 214 (1956) it was held that a federal agent who had obtained evidence by means of an invalid federal search warrant could be enjoined from testifying in a state court on the basis of that evidence. At 217:

> "The obligation of the federal agent is to obey the Rules . . . that are drawn for innocent and guilty alike . . . . They are designed to protect the privacy of the citizen, unless strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings."

To the same general effect, applying the rule of exclusion to state courts as well, see *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

In *Walder* v. *United States*, 347 U.S. 62, 64 (1954), an unlawful search and seizure case, this Court said:

> "The Government cannot violate the Fourth Amendment—in the only way in which the Government can do anything, namely through its agents—and use the fruits of such unlawful conduct to secure a conviction.

> . . . Nor can the Government make indirect use of such evidence for its case, . . . or support a conviction on evidence obtained through leads from the unlawfully obtained evidence. . . . All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men."

It is the policy of this Court that the trial court must exclude all evidence obtained as a consequence of unlawful official acts: the "fruit of the poisonous tree". *Costello* v. *United States*, 365 U.S. 265, 280 (1961).

In the present case it is undisputed that McCaffrey, for purposes of enforcing the law in his own peculiar manner, deliberately violated the federal criminal law in disclosing information from the Bergman tax files to Glassman, and that, as in the *Benanti* case noted above, this Court is presented with

> ". . . a federal conviction brought about in part by a violation of federal laws, in this case in a federal court." 355 U.S. at 102.

c. *In affirming the trial court's admission of evidence procured by the government by secret electronic transmission and recording and by seizure of a document from a defendant at the time of his arrest the Court of Appeals decided an important question of federal constitutional law in a manner not in conformity with the decisions of this Court.*

Prior to trial, petitioners moved to suppress the paper on which was purportedly written how much had been paid by and was still due from Bergman (R. 29). That paper had been seized from Glassman at the time of his arrest.

Petitioners also moved to suppress various secret Minifon recordings of conversations between one or more of the petitioners and McCaffrey and the testimony of agents who had overheard some of those conversations by means of hidden radio transmitters or dynamic microphones (R. 29-30). Some of those conversations took place at McCaffrey's office in the Regional offices of the Internal Revenue Service. One occurred in his automobile. Still others occurred at different places, including the law offices of Glassman and Gorin, a hospital, Gorin's golf club, and a restaurant. Authority for such electronic surveillances had not been obtained from any state court (R. 30-31).

After a hearing, both motions were denied.

At the trial the same objections were renewed and again denied. Petitioners also objected unsuccessfully to the admission of the recordings for the further reason that they were "in many places inaudible as to be unintelligible and, therefore, untrustworthy as evidence."[6]

(1) *The Paper Seized from Glassman at the Time of His Arrest.*

Even if the search of Glassman's person was reasonably incidental to his arrest, the paper could not have been lawfully seized because it was a private paper "of evidential value only" and was not an article which could be validly seized, either under the authority of a search warrant or during the course of a search incident to arrest. It was not one of the "instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime." *Harris* v. *United States*, 331 U.S. 145, 154, 67 S. Ct. 1098, 1103 (1947).

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[6] *Gorin* v. *United States*, 313 F.2d 641 (C.A. 1, 1963).

The federal courts have uniformly held that an individual's private papers wanted solely for use as evidence of crime cannot "lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were." *United States* v. *Lefkowitz*, 285 U.S. 452, 464-465, 52 S. Ct. 420, 423 (1932), and cases cited. To the same effect are *Abel* v. *United States*, 362 U.S. 217, 234-235, 80 S. Ct. 683, 695 (1960); *Harris* v. *United States*, 331 U.S. 145, 154, 67 S. Ct. 1098, 1103 (1947); *Brock* v. *United States*, 223 F.2d 681, 686 (C.A. 5, 1955); *Takahashi* v. *United States*, 143 F.2d 118, 123-125 (C.A. 9, 1944). They certainly cannot be seized in the course of a search claimed to be incidental to a lawful arrest.

In *Lefkowitz* this Court said at pages 465-467 of 285 U.S., at pages 423-424 of 52 S. Ct:

> ". . . The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the government, to discover property concealed to avoid payment of duties for which it is liable, *and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia, and illicit liquor in order to prevent the commission of crime. Boyd* v. *United States*, 116 U.S. 616, *et seq.*, 6 S. Ct. 524, 29 L. Ed. 746; *Weeks* v. *United States*, 232 U.S. 383, 395, 34 S. Ct. 341, 53 L. Ed. 652, L.R.A. 1915B, 834, Ann. Cas. 1915C, 1177; *Gouled* v. *United States*, *supra*, 255 U.S. at 306, 41 S. Ct. 261, 65 L. Ed. 647; *Carroll* v. *United States*, *supra*."

The paper in the instant case was no more an instrumentality of the crimes alleged in the indictment than were the letters which, in *Weeks* v. *United States*, 232 U.S. 383, 397, 34 S. Ct. 341, 344 (1914), were held to have been taken "in direct violation of the constitutional rights of the defendant;" or the unexecuted form of contract and the bill for legal services which, in *Gouled* v. *United States*, 255 U.S. 298, 310-311, 41 S. Ct. 261, 265 (1920) were held to have been taken in violation of the Fourth and Fifth Amendments, *even though seized under a validly issued search warrant;* or the papers which, in *United States* v. *Lefkowitz*, 285 U.S. 452, 464, 475, 52 S. Ct. 420, 423 (1932) were held to have been exempt from seizure "*even under a search warrant issued upon ample evidence and precisely describing such things and disclosing such things and disclosing exactly where they were;*" or "the application for a license" and the "consignment" which, in *Takahasi* v. *United States*, 143 F.2d 118, 123-125 (C.A. 9, 1944), were directed to be suppressed; or the private papers which, in *Brock* v. *United States*, 223 F.2d 681, 686 (C.A. 5, 1955), were held to be inadmissible under the Fifth Amendment.

Cases such as *Marron* v. *United States*, 275 U.S. 192, 48 S. Ct. 74 (1927); *Harris* v. *United States*, 331 U.S. 145, 67 S. Ct. 1098 (1947); *Abel* v. *United States*, 362 U.S. 217, 80 S. Ct. 683 (1960); and *United States* v. *Clancy*, 276 F.2d 617 (C.A.7, 1960); are clearly inapposite. In each of those cases, the articles seized were used either to commit or carry on a crime or, as in the *Harris* case, were property the mere possession of which was a crime.

The paper in the case at bar, on the other hand, could not have been found to have been an instrumentality or means by which the crime was being committed at the time of Glassman's arrest. Its seizure could not possibly be justified on the ground that it would prevent further violations of the law, for the paper, if anything, contained

admissions of a crime. Its production, in the face of a claim of constitutional privilege, could not be compelled by a subpoena *duces tecum*. – *Boyd* v. *United States*, 116 U.S. 616, 634-635, 6 S. Ct. 524, 534-535 (1886); *Counselman* v. *Hitchcock*, 142 U.S. 547, 580-582, 12 S. Ct. 195, 204-205 (1892); *Wilson* v. *United States*, 221 U.S. 361, 377, 31 S. Ct. 538, 543 (1911). Cf. *Emery's case*, 107 Mass. 172, 185 (1871). If by some strain of logic the paper here involved could be treated as an instrumentality of crime, the Fourth Amendment to the Federal Constitution would become the means for subverting the Fifth Amendment, both of which proscribe compulsory disclosure.

The opinion of the Court of Appeals states in substance that Glassman "voluntarily" gave the paper to the arresting officer, and stresses the absence of threats, promises, or intimidation.

This conclusion overlooks the realities of the situation and reflects a divergence of opinion between the Court of Appeals below and the other Courts of Appeals. Glassman was under arrest (R. 82) and held in custody in the offices of the United States Marshal. (R. 82) He declined the officer's original request for the paper (R. 82) and produced it only after the officer insisted that he wanted to see it "anyway". (R. 83)

In these circumstances, compliance with a "request", however politely phrased, obviously is compliance with an order. Surely Glassman was not required to engage in physical combat with the arresting officers in order to avoid a waiver of his constitutional rights. He tried to hold back the paper. The circumstances obviously were coercive even if the officer's words were "civil".

The proper and realistic approach to this issue is stated in the often-cited case of *Judd* v. *United States*, 190 F.2d 649, 650-651 (C.A.D.C. 1951):

"(The individual) . . . may give his consent to the search and seizure. But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. . . . Thus 'invitations' to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force. . . . A like view has been taken where an officer displays his badge and declares that he has come to make a search . . . , even where the householder replies 'All right.' . . . A finding of consent in such circumstances has been held to be 'unfounded in reason' . . . ."

"This burden on the government is particularly heavy in cases where the individual is under arrest. Non-resistance to the orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found." (Case citations omitted.)

For more recent decisions speaking to the same effect, see, *e.g.*, *Gatlin* v. *United States*, 326 F.2d 666, 673 (C.A. D.C. 1963); *Wion* v. *United States*, 325 F.2d 420, 423 (C.A. 10 1963); *Canida* v. *United States*, 250 F.2d 822, 825 (C.A. 5 1958).

The cited cases point out, in effect, that any compliance with the "requests" of arresting officers must be deemed involuntary in the absence of very strong proof that compliance was the product of a free will operating with utter indifference to the circumstances.

This Court has long recognized that a defendant does not waive any rights by producing a document in submission to authority. See *Johnson* v. *United States*, 333 U.S. 10, 13 (1948).

This Court should review the decisions of the courts below in view of their obvious divergence from the decisions of this Court and other Courts of Appeals on this important question of federal constitutional law.

(2) *The secret transmission and recording of private conversations.*

The petitioners contend that their right to privacy was so invaded by the secret transmission and recording of private communications that their convictions based upon evidence procured therefrom should be set aside.

The constitutional issue presented by the circumstances of the present case should be decided by this Court in view of its recent decision and the variety of opinions in *Lopez* v. *United States*, 373 U.S. 427, 83 S. Ct. 1381 (1963). The majority in the *Lopez* case sustained the particular use of electronic devices there presented in the absence of any "violation of federal law or rules of procedure." *Lopez* v. *United States*, *supra* at 440. In the present case some of the petitioners' conversations were secretly monitored and recorded in violation of state law.

G. L. (Ter. Ed.) c. 272, ss. 99 and 100, as amended through St. 1959, c. 449, make criminal mechanical or electronic eavesdropping or wiretapping at any place (s. 99) as well as the installation of such devices for that purpose (s. 100), except when done in accordance with a court order (s. 99). Cf. *Commonwealth* v. *Publicover*, 327 Mass. 303, 98 N.E. 2d 633 (1951). Section 101 makes the mere proof of the installation of such a device or the tapping of any wire *prima facie* the commission of a crime "unless duly authorized and done with the consent of the owner or person in control of the building." That section concludes by providing that nothing contained therein or in sections 99 or 100 "shall

render it unlawful for any person to install and use such a device on premises under his exclusive control." Cf. *Commonwealth* v. *Dougherty*, 343 Mass. 299, 303-305, 178 N.E. 2d 584, 586-588 (1961).

No court order was obtained in the case at bar (R. 30-31). While there may be a serious doubt as to whether state law was violated when conversations in McCaffrey's office or automobile were electronically monitored or recorded (*Commonwealth* v. *Dougherty*, 343 Mass. 299, 303-305, 178 N.E. 2d 584, 586-588 (1961)), there can be no question that state law was violated when other conversations which took place away from the Internal Revenue offices were overheard or recorded.

This Court's recognition that federal courts cannot be "accomplices in willful disobedience of law," *McNabb* v. *United States*, 318 U.S. 332, 345, 63 S. Ct. 608, 615 (1943); *Elkins* v. *United States*, 364 U.S. 206, 223, 80 S. Ct. 1437, 1447 (1960), required the exclusion in a federal trial of evidence obtained in violation of state law. Any other result can only lead to a "double standard", under which state courts would be required, in the interest of "a healthy federalism," "to respect the . . . criteria" established by federal courts,[7] but federal courts would be permitted "to encourage disobedience" to state law. "Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of 'working arrangements' whose results are equally tainted." *Mapp* v. *Ohio*, 367 U.S. 643, 657-658, 81 S. Ct. 1684, 1693 (1961).

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[7] By suppressing evidence obtained in violation of the federal constitution, *Mapp* v. *Ohio*, *supra*, or in violation of federal law, *Pugach* v. *Dollinger*, 277 F.2d 739 (C.A. 2, 1960), affirmed 365 U.S. 458, 81 S. Ct. 650 (1961).

2. *In affirming the trial court's refusal to dismiss the indictment and to strike the panel of petit jurors on the ground that both the grand and petit jurors were not selected in accordance with federal law the Court of Appeals has decided a question of federal law which directly affects the administration of justice in every federal district court and which has not been, but should be, settled by this Court.*

Prior to the commencement of the trial, all the Appellants moved to strike the petit jury panel (R. 32-33) and to dismiss the Indictment (R. 31) on the ground that the jurors in each body had been improperly selected. The trial court denied each motion (R. 31-33).

The evidence adduced at the first trial[8] and at pre-trial hearing on the motions of the defendants established that jurors are selected by the United States Jury Commissioners for the District of Massachusetts from lists of jurors supplied to the Commissioners by the cities and towns within that part of the District designated by the District Court as the source from which jurors are to be drawn (1-R. 110-111). The evidence further established that the lists from the City of Boston are selected by the City of Boston Election Commissioners solely from the lists of registered voters in that City (1-R. 114). This method of selection is violative of federal law and of Section 1 of Chapter 234 of the General Laws of Massachusetts.

The Civil Rights Act of 1957, 28 U.S.C.A. 1861, provides as follows:

> "Any citizen of the United States who has attained the age of twenty-one years and who has resided for

[8] The evidence taken on the selection of the jury panels at the first trial was incorporated as part of the record in the second trial by stipulation (R. 502-503). References to the record of the first trial are designated "1-R."

> a period of one year within the judicial district, is competent to serve as a grand or petit juror. . ."

The standards against which jury selection methods are to be tested were set forth by this Court in *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946), at page 220:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith* v. *Texas*, 311 U.S. 128, 130; *Glasser* v. *United States*, 315 U.S. 60, 85. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. . ."

In *United States* v. *Heath*, 103 F. Supp. 1, D. Hawaii (1952), at page 2, it was said:

> "If the jury list from whence came this Grand Jury was not a legal cross-section of those in the community qualified to be considered for jury duty as defined by Supreme Court decisions, then the list was invalid . . . A good Grand Jury could not possibly result from an invalid list. *Ballard* v. *United States*, 1946, 329 U.S. 187 at page 195."

Two cases have arisen in other districts wherein objections were made to panels of jurors on the basis that the jurors were selected solely from lists of registered

voters or from among those qualified under state law for service as state jurors.

United States v. *Hoffa*, 196 F. Supp. 25, S. D. Fla. (1961), involved an indictment returned by a federal grand jury selected from lists of qualified voters in the State of Florida and, in some cases, from lists of persons qualified under Florida law for jury duty. On the basis of the *Thiel* and *Ballard* cases the District Court dismissed the indictment without a showing of prejudice saying, at page 29,

> "From the date of this amendment (to the federal jury selection laws by the enactment of sec. 1861), and at the time of the selection of the names added to the jury box for the drawing of the grand jury on June 11, 1959, the limitations upon jury selection under the Florida State laws, including a requirement that a prospective juror must be a registered voter, were no longer to be considered in selecting jurors in Federal Courts. Indeed, this very requirement of registration to vote, existing in many states, was one of the prime reasons for the change in the Federal Statute by Congress."

In *United States* v. *Greenberg*, 200 F. Supp. 382, S.D. N.Y. (1961), the defendant challenged the array from which the grand jury which had indicted him was drawn. The challenge was based upon evidence that the jury commissioners selected potential jurors from the lists of registered voters within the judicial district. The Court considered the evidence and denied the challenge on the ground that the method of selection was within the statute and resulted in a fair cross-section.

It is clear that 28 U.S.C. 1861 was violated in the instant case. Moreover, if the Court in *Hoffa* is correct in its statement that one of the prime reasons for the change in the federal statute by Congress was the elimination of the

voter test existing in many states, then the method of selection used in the present case can only result in a jury which the Congress of the United States has declared to fall short of the "fair cross-section" test. This is compounded by the fact that a violation of state law, not present in the *Greenberg* case, underlies the list submitted to the Federal Jury Commissioners by the Boston Election Commissioners.

Assuming that the discrimination which occurred in this case (and which is still occuring in the District of Massachusetts) did not amount to a violation of the petitioners' constitutional rights, there remains the important federal question as to whether the Civil Rights Act of 1957 is to be given force as an extension of the constitutional requirements surrounding the selection of federal juries or is merely to be considered an idle direction of the Congress, to be disregarded so long as the requirements of the Constitution are met.

It cannot be gainsaid that the method of selection of jurors is of prime importance in the administration of criminal justice. It would seem to follow that the interpretation of a federal statute on the subjest should be of equal importance to this Court.

3. *In affirming the trial court's denial of the petitioners' motions for severance the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court.*

The trial court denied the petitioners' several motions for severance made before and during the trial (R. 16-19, 26-28). Such motions were grounded upon the evidentiary problems caused by the fact that evidence of entrapment had to come from co-defendants, the difficulty of limiting evidence in the minds of the jury and the harmful effect to

a co-defendant's case in the eyes of the jury should a co-defendant be called to the stand and forced to claim his privilege not to testify against himself.

This Court did not reach these issues in *Paoli* v. *United States*, 352 U.S. 232 since in that case, unlike the present one, "A separate trial never was requested in behalf of any defendant." 352 U.S. at 241.

Rule 14 of the Federal Rules of Criminal Procedure provides for severance where "a defendant . . . is prejudiced . . . by such joinder for trial. . ."

When events occur that make continued joinder improper or inappropriate (impossibility of proof of a defense or prejudice resulting from trial proceedings here) the trial court has a duty to preserve the rights of the defendant to a fair trial by acting to sever.

4. *In affirming the trial court's instructions that the burden of proving that the crimes charged were induced by government agents was on the petitioners and in affirming the trial court's denial of the petitioners' motions for acquittal, the Court of Appeals decided an important federal questions in a manner not in conformity with the opinions of other Courts of Appeals and which has not been, but should be, settled by this Court.*

The trial court charged the jury in substance that as to the defense of entrapment the defendants had the burden of proving by a preponderance of the evidence that they were induced to perform the alleged crime by action of government agents. This was in accord with the decision of the Court of Appeals for the First Circuit in *Gorin* v. *United States*, 313 F. 2nd 641 (C.A. 1, 1963), *cert. den.* 374 U.S. 829, 83 S. Ct. 1870 (1963). The defendants objected

to the charge and affirmatively requested that the Court charge the jury that the Government had to prove the lack of such inducement beyond a reasonable doubt and duly objected to the refusal so to charge the jury (R. 445, 451, 456, 461, 474, 482, 492).

The crucial facts established at the trial with respect to entrapment may be summarized as follows:

(a) *Re: Glassman*

The entrapment of Glassman lies primarily in the fact that it was McCaffrey who first suggested the payment of money to himself (R. 192-193) and, therefore, induced the commission of the crime. This suggestion, made on June 20, when listening devices were first installed, should be viewed against the background of prior events, namely:

(1) McCaffrey's encouragement of Glassman to enter the practice of tax law (R. 132-133).

(2) McCaffrey's wistful comment about the difficulty of saving money (R. 138).

(3) McCaffrey's response to the brief telephone conversation of May 31 in having Markham make a record, as if McCaffrey knew precisely where the road would lead (R. 144), coupled with the sending of a letter on the same day to Gorin (Ex. C; R. 140-141, 369, 407).

(4) McCaffrey's willingness, on June 1, to confer with Glassman and to disclose information of a highly confidential nature to him (R. 143, 150-152, 334-335).

(5) McCaffrey's transfer of the case to himself for "better control of it" (R. 190).

(6) Generally, McCaffrey's constant availability to Glassman.

The solicitation of June 20 by McCaffrey should be viewed in the light of subsequent events as well; as, for example, McCaffrey's insistence on haste, thereby effectively depriving Glassman of the opportunity for further consideration and possible withdrawal (R. 199, 340).

Since admittedly the suggestion (or inducement) to pay money to McCaffrey first came from agents acting on behalf of the Government, a judgment of acquittal should have been entered unless the Government proved beyond a reasonable doubt the predisposition of the defendants to commit the alleged crime. No such evidence was introduced that would warrant a finding of predisposition on the part of the defendant Glassman. There is no evidence of any pre-existing course of conduct of bribing government officials and (although such evidence was erroneously excluded; see, *infra*) he had no previous criminal record. There was no "established pattern of criminality." *Whiting* v. *United States*, 296 F.2d 512, 516 (C.A. 1, 1961).

Glassman's conduct from May 31 until June 20, when McCaffrey solicited the bribe, was at most ambiguous and was as consistent with a lawyer seeking assistance in what to him admittedly was a strange, new field of the law from one who had recommended that he become interested in it (R. 132-133), as it was with an attempted bribe; an act that would be totally inconsistent with any previous conduct on his part. If the evidence had ceased just prior to McCaffrey's solicitation, it is clear that an acquittal would have been required. Certainly to this point the evidence would not constitute proof beyond a reasonable doubt of a disposition to commit the alleged crime, not to mention a predisposition to bribe government agents. Thus any conduct that would otherwise be criminal on the part of Glassman resulted directly from McCaffrey's explicit solicitation and constituted entrapment as a matter of law.

(b) *Re: Gorin*

The entrapment of Gorin began as early as June 1, when McCaffrey, knowing that Gorin was the attorney of record in the Bergman case, nevertheless disclosed highly confidential information in the case to Glassman for use by Glassman in the solicitation and eventual entrapment of Gorin and Bergman (R. 334-335, 338).

The use of Glassman as the instrumentality of Gorin's entrapment resumed on June 21 when McCaffrey inquired whether "anyone else" might "want to review the CAM" (R. 344-345). This was the first of a series of subtle suggestions designed for transmission to Gorin and calculated to lure him into the illicit venture. The pattern continued as follows:

(1) McCaffrey's suggestion to Glassman that Gorin be shown a copy of the CAM (R. 346-347).

(2) McCaffrey's suggestion to Glassman that Gorin write a back-dated letter in support of the CAM (R. 205, 346).

(3) McCaffrey's telephone conversation of July 7 with Glassman (R. 213, 354) and their conference and telephone conversation of July 10 (R. 355-359), which were intended to induce Gorin to obtain Grillo's cooperation in insuring the success of the venture; and this, in spite of Glassman's statement of July 10 that he would not be "unhappy" if the CAM failed (R. 358-359).

(4) The manner in which the Hurney letter was used as a pretense (R. 369-372) for the direct contact of Gorin and the direct solicitation of his assistance in the venture, particularly McCaffrey's message to Gorin through Glassman:

"And Gorin, I hope, will say, 'Look, Mac, I'll take care of it.' " (R. 367).

Then, on July 20, the entrapment was completed by McCaffrey's direct call to Gorin. Having been gradually conditioned by McCaffrey over the period of the prior fifty days, Gorin accepted the situation, complied with McCaffrey's request for assistance, and was soon enmeshed in the illicit venture.

Prior to July 20, McCaffrey had no conversations with Gorin concerning the Bergman case except the one in which their conference was postponed to July 6. There was, prior to that date, no reason to believe that Gorin was privy to the bribery. Moreover, there was no evidence adduced during the trial which would prove that Gorin was predisposed to commit the crime of bribery, with the possible exception of statements made by Gorin on and after July 20. However, such statements were made long after the initial entrapment and were themselves the product of the entrapment.

(c) *Re: Grillo*

The first clear attempt to use Glassman as the instrumentality of Grillo's entrapment occurred on July 10 when McCaffrey stated to Glassman that it was "time" for Grillo "to act" (R. 355). This was followed by two direct calls to Grillo, on July 13 and July 19, respectively, which failed to produce any results.

The solicitation of Grillo through indirect means resumed on August 10, when McCaffrey told Gorin that the protest to the CAM was formidable and that it might be necessary to get together with Grillo (R. 385). Having been entrapped himself, Gorin was now being used as the instrumentality

of Grillo's entrapment. The pattern of solicitation continued as follows:

> (1) The repeated complaints and exhortations of August 14 concerning Grillo's inactivity and the need for assistance from him (R. 269-278).
>
> (2) The direct call from McCaffrey to Grillo of August 15 (R. 287-289), resulting in the conference which McCaffrey testified he tried in every way to bring about (R. 387).
>
> (3) The direct solicitation of Grillo by McCaffrey on August 15 to "straighten this case out" (R. 308)

As in the case of Glassman and Gorin, no evidence was introduced to show either a reasonable cause to believe that Grillo was corrupt or predisposed to bribery.

(d) *Generally*

The timing of the installations of the listening devices in McCaffrey's office on June 20, July 12, and July 18, and in Grillo's office on July 11 and 12, was not merely accidental. Each installation was immediately followed either by a telephone call from McCaffrey to one of the petitioners or by a conference in McCaffrey's office with one of the petitioners. The conclusion is inescapable that the Government deliberately set about to lure the petitioners into McCaffrey's office for the purpose of creating evidence for a criminal prosecution.

This Court has not considered the issues here presented on the law of entrapment since 1958, when it decided *Sherman* v. *United States,* 356 U.S. 369, and *Masciale* v. *United States,* 356 U.S. 386. Each of those cases presented the conventional entrapment situation of a direct solicitation of crime by a government agent. Such a situation

is also presented here by the circumstances of the petitioner Glassman's entrapment. And even if it is assumed that Glassman was not entrapped, the case presents the novel questions as to how far the Government may go and what methods it may lawfully use in the encouragement of a person like Glassman, who is suspected of having an intent to commit bribery, where it is known that such person will endeavor to enlist the assistance of other innocent persons, like Gorin.

The petitioners contend that while the government need not disprove entrapment unless the issue is raised by the evidence, nevertheless the burden is upon the government to disprove inducement if that issue is made apparent by the evidence (as it clearly was in this case). If entrapment is shown, the defendant is *not guilty* of a crime. Entrapment is *not* in the nature of a plea in bar relied upon despite guilt. *Sorrells* v. *United States*, 287 U.S. 435, 452 (1932).

The burden of proving guilt beyond a reasonable doubt never shifts, but remains upon the government throughout the trial. *Lurding* v. *United States*, 179 F.2d 419, 422 (C.A. 6, 1950). *Blocker* v. *United States*, 288 F.2d 853, 856 (C.A. D.C. 1961) (insanity); *Davis* v. *United States*, 160 U.S. 469, 487 (1895) (insanity); *United States* v. *Barrasso*, 267 F.2d 908, 910 (C.A. 3, 1959) (alibi). In each of these cases a conviction was reversed because the court's instructions to the jury indicated that the burden might be on the defendant to prove some element of defense.

The other Courts of Appeal have been unanimous in ruling that the burden is upon the government to disprove inducement, or, if inducement is shown, to prove sufficient excuse for inducement. *Marks* v. *United States*, 260 F.2d 377, 381 (C.A. 10, 1958), *cert. denied* 358 U.S. 929; *Marbs* v. *United States*, 250 F.2d 514, 516 (C.A. 8, 1957), *cert. denied* 356 U.S. 919; *United States* v. *Masciale*, 236 F.2d 601, 603

(C.A. 2, 1956), *affirmed* 356 U.S. 386; *Lunsford* v. *United States*, 200 F.2d 237, 239 (C.A. 10, 1952); *Carlton* v. *United States*, 198 F.2d 795, 798 (C.A. 9, 1952); *Gargano* v. *United States*, 24 F.2d 625, 626 (C.A. 5, 1928).

If the issue is raised, the government must prove beyond reasonable doubt that there was no entrapment. *Ryles* v. *United States*, 183 F.2d 944, 945 (C.A. 10, 1950), *cert. denied* 340 U.S. 877.

The trial court and Court of Appeals below appear to have relied upon a portion of the Second Circuit's opinion in *United States* v. *Sherman*, 200 F.2d 880, 882-883 (C.A. 2, 1952), in which was stated:

> "Therefore in such cases two questions of fact arise: (1) did the agent induce the accused to commit the offence charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offence. On the first question the accused has the burden; on the second the prosecution has it."

(The same statement is quoted in *Kivette* v. *United States*, 230 F.2d 749, 754 (C.A. 5, 1956), *cert. denied* 355 U.S. 935).

However, as explained in *United States* v. *Silva*, 180 F. Supp. 557, 558 (S.D.N.Y. 1959), the reference to "the burden" with respect to inducement, in the quoted passage, means the burden of going forward with the evidence; and the burden of proof beyond reasonable doubt as to inducement (or, more precisely, lack of inducement) remains upon the government.

Under our system of jurisprudence, no man may be convicted unless proven guilty beyond reasonable doubt. This rule is so firmly established as to require no citation of authorities. The rule set forth in the *Silva* case, placing

the burden of going forward with the evidence upon the defendant, but leaving the burden of proof as to absence of inducement upon the government, is sound and proper.

The courts below clearly erred (although the error may be understandable in light of the ambiguous language quoted above), in misplacing the burden of proof as to inducement, and, since the petitioners' defense was that of entrapment, the error clearly was prejudicial to them and required that their convictions be reversed. There can be no doubt that the elements of entrapment recognized by this Court and the Courts of Appeals were presented by the evidence at the trial. *e.g. Sherman* v. *United States*, 356 U.S. 369 (1958); *United States* v. *Sizer*, 292 F.2d 596, 599 (C.A. 4, 1961); *Malatofski* v. *United States*, 179 F.2d 905, 918 (C.A. 1, 1950); *Lunsford* v. *United States*, 200 F.2d 237, 240 (C.A. 10, 1952); *United States* v. *Klosterman*, 248 F.2d 191, 196 (C.A. 3, 1957).

The comprehensive question presented here is whether the law of entrapment can be developed to meet highly sophisticated methods of inducement to crime, which avoid the clumsy, direct solicitations heretofore condemned by this Court.

Moreover, in the present case the evidence showed entrapment as a matter of law. This Court and the vast majority of the Courts of Appeals have consistently held that a defendant may not be convicted of a crime which was induced by government agents unless such defendant was engaged in an established pattern of continuing criminal conduct prior to the inducement. *e.g. Sorrells* v. *United States*, 287 U.S. 435 (1932); *Sherman* v. *United States*, 356 U.S. 369 (1958); *Masciali* v. *United States*, 356 U.S. 386 (1958); *United States* v. *Klosterman*, 248 F.2d 191 (C.A. 3, 1957); *United States* v. *Sizer*, 292 F.2d 596 (C.A. 4, 1961); *Henderson* v. *United States*, 237 F.2d 169 (C.A. 5, 1956); *Ryles* v. *United States*, 183 F.2d 944 (C.A. 10, 1950), *cert.*

denied 340 U.S. 877. The Court of Appeals for the First Circuit has also applied this rule in other recent cases. *e.g.*, *Whiting* v. *United States*, 296 F.2d 512 (C.A. 1, 1961).

In *United States* v. *Klosterman*, *supra*, the test of entrapment directly applicable to the present case was set forth:

> "We do not think that the degree of persuasion is significant where the first approach is made by the agent of the law to an apparently innocent man." 248 F.2d at 196.

The application of the above rules to the undisputed facts of the present case leads to the inescapable conclusion that entrapment of the petitioners was shown as a matter of law. The undisputed facts established by the testimony of government witnesses were as follows:

1. McCaffrey was a government agent, charged with responsibility in connection with criminal matters or possible criminal matters. (R. 90).
2. McCaffrey at all times was acting in the interests of the government, and never intended to accept a bribe which would influence his decision on the Bergman tax evasion case. (R. 195, 399)
3. The first suggestion of any payment to McCaffrey was made by McCaffrey himself (R. 192-193)
4. McCaffrey's suggestion of the bribe was made by him under instructions from government officials (R. 179-180).

Therefore, under the general entrapment doctrine, the petitioners were entitled to judgments of acquittal unless there was evidence sufficient to establish beyond reasonable doubt that they were already engaged in a continuing course of criminal conduct. There was no such evidence. The

record is barren of any indication that any of the petitioners had ever attempted to bribe anybody with respect to anything prior to McCaffrey's request for payment in connection with the Bergman tax case.

While it was error to deny the petitioners' motions for judgments of acquittal in the absence of any evidence of "predisposition", such error was compounded by excluding evidence of the lack of any prior criminal record on the part of Glassman. The petitioners duly objected to the exclusion of such evidence (R. 65).

Surely if a pre-existing purpose to engage in criminal conduct might be shown by a record of prior convictions, *Whiting* v. *United States, supra,* at 516, the absence thereof is admissible to show lack of such predisposition.

5. *In affirming the trial court's instructions of the jury with respect to predisposition in the absence of any evidence of predisposition the Court of Appeals decided an important question of federal law in a manner not in conformity with the decisions of this Court.*

The trial court instructed the jury that if the defendants proved inducement but the Government proved beyond a reasonable doubt that the defendants were predisposed to commit the alleged crimes, they should find no entrapment. The defendant objected to the giving of such instruction (R. 443-447, 448, 456, 461, 471). The petitioners urge that it was error to charge the jury with respect to their predisposition where there was no evidence of such predisposition. There was no evidence of any "continuing course of criminal activity." *Whiting* v. *United States*, 296 F.2d 512 (C.A. 1, 1961).

Since the jury was entitled to believe that the Court's instruction related to some portion of the testimony, they

could only conclude that it related to the conduct of the defendants in the commission of the alleged crime as charged in the indictment and that they could consider such evidence as the "predisposition" the Court referred to in its charge. Since predisposition to commit crime furnishes only an excuse to federal officers to induce a person to commit an offense, evidence of the commission itself can hardly be the foundation for such an excuse. As Justice Roberts said in *Sorrells* v. *United States, supra,* at 459:

> "The accepted procedure, in effect, pivots conviction in such cases, not on the commission of the crime charged, but on the prior reputation or some former act or acts of the defendant not mentioned in the indictment."

To charge the jury in effect that they could consider evidence of the commission of the alleged offense as evidence of predisposition was clearly contrary to the opinions of this Court.

6. *In affirming the trial court's refusal to strike overt acts committed by the petitioners as a result of entrapment activities of a government agent the Court of Appeals decided a question of federal law in a manner not in conformity with the decisions of other Courts of Appeals.*

A motion of the appellants to strike the overt acts alleged in the conspiracy counts of the indictment was denied by the lower court (R. 405-406, 408-409).

Overt Act No. 2 charged that Glassman made a photostat of the CAM (R. 11, 14). McCaffrey admitted that he told Glassman to make the photostat (R. 350-351).

Overt Act No. 3 charged that Glassman delivered a back-dated letter from Gorin to McCaffrey (R. 11,14). McCaffrey admitted that he told Glassman to have Gorin write the letter (R. 346-347).

Overt Act No. 9 charged that Gorin, Bergman, and Grillo discussed the Bergman case with McCaffrey (R. 12, 15). McCaffrey admitted that he did everything he could to bring this conference about (R. 387).

Overt Act No. 10 charged that Bergman requested, and Gorin obtained, a copy of the Special Agent's Report in the Bergman case (R. 12, 15-16). McCaffrey admitted that he offered the report to Bergman and that the Act as charged is incorrect (R. 390-391).

Assuming, for the sake of argument only, that the law of entrapment did not provide a complete defense to the Indictment, the government may not entrap the petitioners into the commission of overt acts which are later alleged as an essential element of the crime. *Henderson* v. *United States*, 237 F.2d 169 (C.A. 5, 1956).

An overt act is an essential element and allegation in the crime of conspiracy. 18 U.S.C. 371. The jury must unanimously find the commission of at least one properly alleged overt act. It is impossible to determine from the general verdict which overt act may have been the basis of unanimous agreement among the jurors.

The conviction, therefore, cannot stand if any one of the overt acts was corrupted by entrapment.

7. *In affirming the trial court's exclusion of evidence of bias on cross-examination of the government's principal witness the Court of Appeals ignored a fundamental rule of evidence.*

The government's chief witness, McCaffrey, was asked on cross-examination whether he was anxious for the gov-

ernment to prevail. The question was excluded without a prior objection by the government (R. 400-401).

That there can be no valid objection to such a question is beyond doubt. See 3 Wigmore, Evidence §940 (3rd ed. 1940).

Where, in addition, the question is put to the government's chief witness and is excluded without prior objection from the government, the error is prejudicial. *Meeks* v. *United States*, 163 F.2d 598 (C.A. 9, 1947).

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted. The decision of the Court of Appeals presents serious and important questions of federal law, the resolution of which is vital to the administration of federal criminal justice.

Respectfully submitted,

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Appendix A

United States Court of Appeals
For the First Circuit

No. 6256.

HENRY GRILLO,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE;

No. 6262.

SAUL GLASSMAN,
DEFENDANT, APPELLANT,
v.
SAME;

No. 6264.

PAUL A. GORIN,
DEFENDANT, APPELLANT,
v.
SAME.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Manuel Katz, with whom *Paul T. Smith* was on brief, for Henry Grillo, appellant.
James D. St. Clair, with whom *Hale and Dorr* was on brief, for Saul Glassman, appellant.

Francis J. DiMento, with whom *DiMento and Sullivan* was on brief, for Paul A. Gorin, appellant.

John J. Curtin, Jr., Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, and *William F. Looney, Jr.*, Assistant U. S. Attorney, were on brief, for appellee.

OPINION OF THE COURT.

September 17, 1964.

WOODBURY, *Chief Judge*. This court on a previous appeal considered and rejected a number of contentions advanced by these appellants. We remanded, however, for a new trial for what we considered to be an error in the charge with respect to the burden of proof on the issue of entrapment. *Gorin* v. *United States*, 313 F.2d 641 (C.A. 1, 1963). At the second trial the court charged in accordance with our opinion but the appellants fared no better and they have again appealed.

We reaffirm our previous holdings. Only a few matters require consideration on this appeal.

In our opinion on the previous appeal we set out the charges laid against these defendants-appellants and the facts adduced at the first trial in some detail. Repetition here would serve no useful purpose. It will suffice to say that entrapment was a principal if not the major issue at both trials. On the previous appeal the appellants contended that the evidence established entrapment as a matter of law whereas the government contended that the evidence failed even to raise the issue. We rejected both contentions and agreed with the district court that the evidence as to entrapment raised an issue for the jury. The same contentions are presented on this appeal and again we reject them. The principal difference between the evidence at the two trials is that the defendant Glassman elected to testify at the first trial but did not take the stand at the second. This weakened the evidence of entrapment. Perhaps it weakened that evidence to the point of supporting the

government's contention. But we can give the appellants the benefit of the doubt, as the district court did by submitting the issue to the jury a second time.

Another contention now advanced is that the court below erred in not striking and withdrawing from the consideration of the jury certain alleged overt acts on the ground that the evidence established that the alleged conspirators who perpetrated the acts had been entrapped into committing them. We reject the contention. The most that can be said of the evidence is that the government agents left the door unlocked for the perpetrators of the acts to lift the latch and walk in. That is not entrapment.

Another contention is that the court below erred in admitting in evidence a verbatim copy of notations on a piece of yellow paper found in Glassman's possession when he was arrested.

Glassman was taken into custody on a warrant of arrest, the validity of which is not challenged, by an inspector of the Internal Revenue Inspection Service of the United States Treasury Department and a Deputy United States Marshal. The arresting officers took Glassman to the United States Marshal's office in Boston and asked him to put his personal effects on a desk. Glassman complied. The inspector then asked Glassman to empty the contents of his wallet. Glassman did so in part but the inspector, noticing that some papers were still in Glassman's wallet, asked to see them all. Glassman said that the papers remaining in his wallet were personal and unimportant, but the inspector said he would like to see them anyway. Thereupon Glassman produced a sheet of yellow paper with figures and notations on it showing the division of Bergman's fee between the alleged conspirators and the dates and amounts of the payments made by Glassman to McCaffrey as stated in our previous opinion. The inspector

copied the yellow paper verbatim and the copy was admitted in evidence over the appellants' objections.

The appellants do not contend that the search of Glassman's person upon his arrest was illegal. Nor can they. "Where one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him." *United States* v. *Rabinowitz*, 339 U.S. 56, 60 (1950), citing *Weeks* v. *United States*, 232 U.S. 383, 392 (1914).

Their contention is that the yellow paper was a private document wanted only as an item of evidence to aid in obtaining a conviction and as such could not be lawfully seized under the rule of *United States* v. *Lefkowitz*, 285 U.S. 452 (1932), and similar cases. We do not agree. It seems to us that the memorandum was as admissible in evidence as the books of account and utility bills held properly admitted in *Marron* v. *United States*, 275 U.S. 192 (1927), or the false documents held admissible in *Abel* v. *United States*, 362 U.S. 217 (1960). But however that may be, there was no rummaging about for the paper as in *Lefkowitz*. The agent saw papers remaining in Glassman's wallet and Glassman handed the yellow paper over voluntarily by acceding without objection to the officer's civil request to look at it. There is no evidence that the arresting officers used any threats or held out any promises of reward to obtain the paper or to copy it. Nor can it be assumed that Glassman handed over the paper in ignorance of his rights, or that he was intimidated by the mere request of the officers. Glassman was a member of the Massachusetts Bar and a colonel in the United States Marine Corps Reserve. If he had any right to refuse inspection of the yellow paper, he waived it by voluntarily giving the paper to the officer.

The appellants' objections to the admission and exclusion of evidence present no questions of substance whatever. The rulings made were either clearly correct as a

matter of law or well within the discretion of the district judge. Discussion of the rulings in detail would serve no useful purpose.

Judgment will be entered affirming the judgments of the District Court.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6262.

HENRY GRILLO,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
September 17, 1964

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD,
Clerk.

[cc: Messrs. St. Clair and Curtin.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6262.

SAUL GLASSMAN,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
September 17, 1964

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD,
Clerk.

[cc: Messrs. St. Clair and Curtin.]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6262.

PAUL A. GORIN,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

JUDGMENT
September 17, 1964

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:
(s) ROGER A. STINCHFIELD,
Clerk.

[cc: Messrs. St. Clair and Curtin.]

Appendix C

18 U.S.C.:

"§201. *Offer to officer or other person*

"Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be. . . . ."

18 U.S.C.:

"371. *Conspiracy to commit offense or to defraud United States*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be . . ."

18 U.S.C.:

"§1905. *Disclosure of confidential information generally*

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be . . ."

26 U.S.C.:

"§7213. *Unauthorized disclosure of information*

(a) *Income returns.*—

(1) Federal employees and other persons.—It shall be unlawful for any officer or employee of the United States to divluge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful

for any person to print or publish in any manner whatever not provided by law any income return or any part thereof or source of income, profits, losses, or expenditures, appearing in any income return; and any person committing an offense against the foregoing provision shall be guilty of a misdemeanor and, upon conviction thereof, shall be . . ."

26 U.S.C.:

"§7214. *Offenses by officers and employees of the United States*

"(a) *Unlawful acts of revenue officers or agents.*— Any officer or employee of the United States acting in connection with any revenue law of the United States—

. . . . . .

(4) who conspires or colludes with any other person to defraud the United States; or

. . . . . .

shall be . . ."

Mass. G.L. c. 234:

"§1. *Qualification; exemptions.* A person of either sex qualified to vote for representatives to the general court, whether a registered voter or not, shall be liable to serve as a juror, except that the following persons shall be exempt:

The governor; lieutenant governor; members of the council; state secretary; members and officers of the senate and house of representatives during a session of the general court; judges and justices of a court; county commissioners; clerks of courts and assistant clerks and all regularly appointed officers of the courts of the United States and of the commonwealth; registers of probate and insolvency; registers of deeds; sheriffs and their deputies; constables; marshals of

the United States and their deputies, and all other officers of the United States; attorneys at law; settled ministers of the gospel; officers of colleges; preceptors and teachers of incorporated academies; registered practicing physicians and surgeons; persons over seventy years of age; persons under twenty-five years of age; members of the Ancient and Honorable Artillery Company; members of the volunteer militia; superintendents, officers and assistants employed in or about a state hospital, insane hospital, jail, house of correction, state industrial school or state prison; keepers of lighthouses; conductors and engine drivers of railroad trains; teachers in public schools; enginemen and members of the fire department of Boston, and of other cities and towns in which such exemption has been made by vote of the city council or the inhabitants of the town; Christian Science practitioners and readers, respectively; women trained nurses; women assistants in hospitals; women attendant nurses; mothers of children under sixteen years of age or women having custody of such children and women members of religious orders."

Mass. G.L. c. 272:

"§99. *Eavesdropping; use of devices; wire tapping; court's order*

Whoever, except in accordance with an order issued as provided herein, secretly or without the consent of either a sender or receiver, overhears, or attempts secretly, or without the consent of either a sender or receiver, to overhear, or to aid, authorize, employ, procure, or permit, or to have any other person secretly, or without the consent of either a sender or receiver, to overhear any spoken words at any place by using any electronic recording device, or a wireless tap or

electronic tap, or however otherwise described, or any similar device or arrangement, or by tapping any wire to intercept telephone communications, shall be guilty of the crime of eavesdropping and shall be punished by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both.

Such order may be issued and shall be signed by any justice of the supreme judicial or superior court upon application of the attorney general or a district attorney for the district verified by his oath or affirmation that there are reasonable grounds to believe that evidence of crime may thus be obtained. The finding by a judge or justice that there are reasonable grounds to believe that evidence of crime may thus be obtained shall be final and not subject to review. Said orders shall describe or identify (1) the purpose thereof; (2) the location of and the person or persons who are to be so overheard or whose communications are to be so intercepted if known; (3) if telephone communications are to be so intercepted the telephone line if known; (4) the person or persons who are authorized to so overhear or intercept, or the person or persons under whose supervision such overhearing or interception is to be conducted.

In connection with the issuance of such an order, the justice may examine on oath the applicant and any other witness he may produce, for the purpose of satisfying himself of the existence of reasonable grounds to believe that evidence of crime may be thus obtained. The finding by a judge or justice that there are reasonable grounds to believe that evidence of crime may thus be obtained shall be final and not subject to review. Any such order shall be effective for the time specified therein, but not for a period of more than three months, unless extended or renewed by the justice who signed

and issued the original order, upon satisfying himself that such extension or renewal is in the public interest. Any such order, together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for such interception or directing such overhearing or interception of the telephone communications transmitted over the instrument or instruments described. A true copy of such order shall at all times be retained personally by the judge or justice issuing the same. In case of emergency and when no such justice is available, the attorney general or the district attorney for the district may issue such order, but within seventy-two hours thereafter the said attorney general or district attorney upon oath or affirmation setting forth all the facts, shall apply to a justice of the supreme judicial or superior court for a court order to issue validating the acts of said attorney general or district attorney. If the court refuses, after hearing, to validate such prior order of the attorney general or district attorney, said prior order shall cease to be effective, and no further action thereunder may be taken."

Mass. G.L. c. 272:

"§100. *Acquiescing in installations or wire tapping for eavesdropping*

Whoever, except when authorized under section ninety-nine, for the purpose of eavesdropping as defined in section ninety-nine, either on his own account or as the servant or agent of another, permits or acquiesces in the installing of any electronic recording device or any similar device or arrangement, or the tapping of any wire, shall be punished by imprisonment for not more than two years or by a fine of not more than one thousand dollars, or both."

Mass. G.L. c. 272:

"§101. *Installation or tapping of wires as prima facie evidence; installation on controlled premises.*

Proof of the installation in any building of any device or arrangement which may be used for the purpose of violating the provisions of section ninety-nine by listening to any spoken words or proof of the tapping of any wire, unless duly authorized and unless done with the consent of the owner or person in control of the building, shall be prima facie evidence of the commission of the crime of eavesdropping; but nothing contained in this section or sections ninety-nine and one hundred shall render it unlawful for any person to install and use such a device on premises under his exclusive control."

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 667

PAUL A. GORIN, HENRY GRILLO AND SAUL GLASSMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1a–5a) is reported at 336 F. 2d 211. The opinion reversing a prior conviction is reported at 313 F. 2d 641, certiorari denied, 374 U.S. 829.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1964. A petition for rehearing was denied on October 9, 1964. The petition for a writ of certiorari was filed on November 9, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment should have been dismissed because of pre-indictment publicity.

2. Whether the method used for selecting grand and petit jurors was improper.

3. Whether evidence introduced against petitioners was the "fruit" of unlawful conduct by a government agent.

4. Whether the evidence established entrapment as a matter of law.

5. Whether the instructions to the jury on entrapment were proper.

6. Whether electrical recordings, which corroborated the testimony of an Internal Revenue Service attorney regarding his conversation with petitioners, were properly introduced into evidence.

7. Whether certain evidence was illegally seized from petitioner Glassman at the time of his arrest.

8. Whether various trial rulings were correct.

STATEMENT

Petitioners and Nathaniel Bergman were indicted in the District Court for Massachusetts on three counts. Count 1 charged a conspiracy among all defendants to bribe Charles J. McCaffrey, an employee of the Internal Revenue Service, and to defraud the United States; count 2 charged that petitioners Glassman and Gorin, together with Bergman, gave $10,000 to McCaffrey with intent to bribe; count 3 charged petitioner Grillo with conspiracy to defraud the United States of his services as

an internal revenue officer (R. 10–16).[1] In 1962, after a jury trial, petitioners were convicted. The court of appeals reversed their convictions on the ground that the district court had inadequately instructed the jury on the burden of proof required for the defense of entrapment. 313 F. 2d 641, certiorari denied, 374 U.S. 829. On retrial, petitioners were again convicted. Glassman was sentenced to imprisonment for a period of three years and fined $5,000; Gorin was sentenced to imprisonment for two years and fined $5,000; and Grillo was sentenced to imprisonment for one year and fined $1,500 (R. 8–9). The evidence at the trial may be summarized as follows:

In 1961, the Internal Revenue Service was investigating the income tax returns of Nathaniel Bergman, a Connecticut lawyer. In May 1961, a recommendation for criminal prosecution of Bergman was sent to the Boston regional office of the Intelligence Division of the Internal Revenue Service, where petitioner Grillo was an executive assistant, and then to the Boston Regional Counsel's office for review by its Enforcement Branch, headed by Charles J. McCaffrey, who was a training officer in a Marine Corps reserve unit commanded by petitioner Glassman (R. 508–509, 513–514).

On June 1, 1961, Glassman came to McCaffrey's office to discuss the Bergman case, inquiring about

[1] The record on file with the Clerk consists of the appendices filed below including an appendix filed in the first appeal. The latter appendix is designated herein as "A".

the strength of the government's case (R. 515–518). McCaffrey, after first stating that he should not talk to Glassman because Glassman had not filed an authorization to appear for Bergman, characterized the case as very strong. He disclosed the amounts of the proposed tax deficiencies and other facts. Glassman responded that in a case of this size "there is enough of a fee in it for all of us" (R. 518–519). McCaffrey testified that he spoke with Glassman despite Glassman's failure to file a power of attorney because McCaffrey knew that Gorin was one of the attorneys in the case; this made him extremely suspicious, and he determined to discover if anything was wrong (R. 153–154). McCaffrey reported this conversation to a superior (R. 520).

On June 14, 1961, Glassman told McCaffrey that he had been visited by a friend of Bergman and had demanded $35,000 in escrow, payable if the Bergman case was quashed in McCaffrey's office. McCaffrey replied, "Oh, we will have to play it by ear" (R. 522). The next morning McCaffrey reported this conversation to the Inspection Service, which gave him instructions as to his future conduct in the Bergman case (R. 523).

McCaffrey telephoned Glassman on June 20, 1961, and said he had reassigned the case to himself so that he could review it personally; Glassman said, "Wonderful, wonderful" (R. 527–528). Later that day, Glassman told McCaffrey that he would make Bergman put up part of the escrow money in cash. McCaffrey responded, "Saul, we know what we're

talking about. Let's lay it on the line. What do you have in mind for me?" Glassman replied that McCaffrey would receive between $10,000 and $15,000, adding that he knew of two other cases and that "[t]his thing can start to snowball" (R. 530–532).

On June 21, at a regular Marine Corps reserve meeting, Glassman told McCaffrey that Bergman had agreed to everything. When McCaffrey asked whether anyone would want to review his memorandum recommending against prosecution, Glassman said that he would do so. He also said that half the money would be paid when the memorandum was sent from the enforcement office (R. 533–535).

On June 27, Glassman reported that he had received $15,000 and gave McCaffrey $5,000 in one-hundred dollar bills. He then advised McCaffrey that Gorin had the remainder of the money in his account. McCaffrey showed Glassman a draft of the memorandum recommending no criminal action against Bergman and permitted it to be copied. When Glassman stated that the government file should contain a letter from Gorin as a basis for the points discussed in the memorandum, McCaffrey suggested a back-dated letter (R. 541–547, 203). On the same day, checks totalling $41,500, drawn by Bergman payable to Gorin as trustee, were deposited in a new account opened in the name of Gorin and his brother as trustees (R. 557). On the following day, McCaffrey gave Glassman a final draft of the memorandum and was again paid $5,000 in one-hundred dollar bills (R. 552–555). On July 10, McCaffrey received the back-dated letter signed by Gorin (R. 563–565).

Under Internal Revenue Service practice, the Regional Intelligence office would determine whether to support the recommendation made in the criminal action memorandum or file a protest (R. 509–511). In the conversation between Glassman and McCaffrey on June 27 and 28, Grillo was mentioned as the person who had been approached in the Regional Intelligence office (R. 542–543, 553–554). On July 10, after the Intelligence Division at Hartford wrote McCaffrey that it intended to protest the recommendation, McCaffrey complained to Glassman that Grillo had approved the protest (R. 567–568). On July 13, McCaffrey, in the course of a conversation with Grillo about another tax case, asked him if he had read McCaffrey's memorandum in the Bergman case. Grillo replied that he thought it was good except for its criticism of a Special Agent (R. 568–569).

On July 19, McCaffrey received Glassman's permission to communicate with Gorin after showing Glassman a letter from another of Bergman's attorneys inconsistent with Gorin's back-dated letter (R. 573–574). The next day McCaffrey met Gorin. The latter stated that he and Grillo were close personal friends and that Grillo also wanted to drop the Bergman criminal case. Gorin bragged about "killing" other cases and stated that he would rather close a case in McCaffrey's office "because it would mean $50,000 rather than $10,000". He offered to pay for a trip to Paris or New York for McCaffrey and his wife, suggesting that he "pick up half a dozens suits at 250 bucks a copy" (R. 576–584). Subsequently, he bought McCaffrey a set of golf clubs (R. 591–592).

Between July 26 and August 10, Gorin and McCaffrey had numerous conversations and meetings. Gorin mentioned that Grillo planned to give him a list of cases coming from Hartford and requested a similar list from McCaffrey. They discussed the Bergman case as well as other cases. Gorin said that Grillo was trying to "kill" the Bergman case in his office (R. 587–593, 599–606, 610, 614).

On August 14, Gorin and McCaffrey met again. They discussed the protest made by the Intelligence Division to the memorandum proposing that no criminal action be taken against Bergman. They telephoned Grillo, who was not able to talk to them because a superior was in his office (R. 617–622). In a later conversation, Grillo told McCaffrey that he had tried to stop the protest without success (R. 622). Later that day, Grillo was seen going into the building where Gorin had his office (R. 505–506). Gorin subsequently told McCaffrey that Grillo would see him the next day (R. 626). Gorin informed McCaffrey in Bergman's presence that he had given Grillo $1,500 on the case and that he had promised him $2,500 more "if the case is killed in the protest" (R. 627).

On August 15, Gorin and Grillo came to McCaffrey's office. Grillo gave McCaffrey suggested arguments to counter the protest of the Intelligence Division. He said that he had gone into the Bergman case before, that Gorin had called him on it and that "I did all I could, but it became an impossibility and I dropped it." He also said, "I want to see this

case go by the board more than anybody else." At the conclusion of the conversation, Gorin said to Grillo, "Well, Henry, you have got the pitch, the three of us are working together." (R. 635–638). On August 26, Bergman, Gorin and Glassman were arrested (R. 24). On August 29, Gorin withdrew the $29,000 balance remaining in his trustee bank account and returned it to Bergman (R. 558–559).

ARGUMENT

1. The arrest of petitioners on August 26, 1961, was reported in local Boston newspapers for several days. The Attorney General was quoted as saying that the case had been skillfully investigated and that McCaffrey was a "courageous American and typifies the loyalty and integrity of the men of the Internal Revenue Service" (R. 24–25). On September 6, 1961, petitioners' indictment was returned. Petitioners contend that the statement of the Attorney General was calculated to prejudice the grand jurors against them and that it therefore vitiated the indictment. The statement was not inflammatory, however, and it could hardly have prejudiced the grand jurors. Compare the publicity in *Beck* v. *United States,* 298 F. 2d 622 (C.A. 9), certiorari denied, 370 U.S. 919. In presenting its case to the grand jury the government necessarily endorsed the credibility of McCaffrey; the publicized statement did no more than commend McCaffrey for his integrity. Petitioners argue that the government's role in issuing the news release requires a different result. But if, as here, the pub-

licity could not have had any serious prejudicial effect, its origin is immaterial.

2. The grand jurors who indicted petitioners and the petit jurors who convicted them were drawn from names selected from State jury lists, which, in turn, had been taken from registered voting lists after State officers had weeded out illiterates, felons and all persons exempt from jury service under State law. Mass. Gen. Laws, c. 234, § 1 (A. 110–123). There is no merit to petitioners' attack on this method of selection. Any adult citizen is eligible for federal jury service unless he is a felon, illiterate, or physically or mentally incapacitated. Congress has not, however, specified the means by which names of prospective jurors are to be obtained, delegating to the jury commissioners the task of selecting qualified jurors. 28 U.S.C. 1861 *et seq.* In a large metropolitan, politically conscious community such as Boston, the voting lists are as reasonable a method as any for obtaining a fair cross-section of the community. See *United States* v. *Agueci,* 310 F. 2d 817, 833–834 (C.A. 2), certiorari denied, 372 U.S. 959 (jury selected from voting lists in New York City); cf. *Chance* v. *United States,* 322 F. 2d 201 (C.A. 5), certiorari denied, October 12, 1964, No. 151, this Term. Unlike *United States* v. *Hoffa,* 196 F. Supp. 25 (S.D. Fla.), as *Chance* notes, the voting lists were not limited to male voters and women volunteers. Nor did the Civil Rights Act of 1957, 28 U.S.C. 1861, create a uniform nation-wide system for the selection of federal jurors. That statute dealt with qualifications for federal jury

service and not with the system whereby names are to be chosen.

3. Petitioners also contend (Pet. 27–32) that since McCaffrey disclosed confidential information to Glassman when they met on June 1, all of petitioners' subsequent unlawful conduct was "obtained as a consequence of unlawful official acts * * *" (Pet. 32), and evidence thereof should have been excluded by the district court. This contention lacks substance. For even assuming *arguendo* that McCaffrey's disclosures violated some statute or regulation,[2] it is sheer speculation to suppose, as petitioners do, that but for these disclosures, their unlawful acts would not have been committed. Indeed, by rejecting their defense of entrapment, the jury effectively foreclosed any such claim since it thereby determined, under the court's instructions, that government agents did not "induce and originate [petitioners'] criminal intent" (R. 438). Moreover, even if McCaffrey's alleged violations of federal secrecy statutes or regulations had contributed to petitioners' readiness to engage in unlawful conduct, the evidence would not

[2] The specific statutes cited by petitioners do not appear to cover information obtained by a government investigation of the accuracy of income-tax returns. 26 U.S.C. 7213(a)(1) covers only the information contained in the return, and 18 U.S.C. 1905 is limited, insofar as it is relevant here, to the "amount or source of any income, profits, losses, or expenditures of any person * * *." The disclosures here related to the size of the civil deficiencies, "the opening net worth figure and the closing net worth figure," the number of savings accounts maintained by Bergman, and the fact that it was a "strong case" (R. 334–335).

thereby be rendered inadmissible. Unlike the protections of the Fourth Amendment, which are aimed at preserving the right to privacy which an unreasonable search violates, the secrecy statutes and regulations on which petitioners rely are not intended to protect those to whom the secret information is unlawfully disclosed. Persons such as petitioner Glassman and those to whom he transmitted the confidential information are in no position, therefore, to assert the secrecy rules as a basis for excluding evidence used against them.

4. Petitioners claim that the evidence established entrapment as a matter of law. They contend (Pet. 44–50, 52–54) that McCaffrey first suggested the payoff and used Glassman as a pawn to entrap Gorin. The evidence showed, however, that before McCaffrey asked Glassman what he had in mind, Glassman had told McCaffrey that he had demanded $35,000 conditioned upon the criminal case being dropped by McCaffrey's office. He had also informed McCaffrey that the Bergman case had "enough of a fee in it for all of us." As for Gorin and Grillo, their own remarks, see pp. 7–8, *supra*, disclosed that they had tried to quash Bergman's prosecution at an earlier stage of the investigation. Accordingly, there was substantial evidence rebutting petitioners' claims that they had been entrapped. Indeed, as the court of appeals noted (Pet. App. A 2a–3a), since Glassman did not testify at this trial it is questionable whether there was even sufficient evidence of entrapment to warrant submission of that issue to the jury.

5. In its instructions on entrapment, the district court followed the rule laid down in the earlier opinion of the court of appeals. 313 F. 2d 653–654. After defining and explaining entrapment (R. 437–440), the court summed up entrapment in two questions of fact: Did the government induce the offenses, and, if so, were the defendants predisposed, without persuasion, to commit the offenses. The court then charged that the defendants were required to prove the first element—inducement—by a preponderance of the evidence, and that the prosecution had the burden of proving the second—predisposition—beyond a reasonable doubt (R. 441). The court had previously instructed that the government had the burden of proving guilt beyond a reasonable doubt and that this burden remained with the government throughout the trial and never shifted (R. 412).

Petitioner's argument (Pet. 54–55) that the court should not have submitted the issue of predisposition to the jury because there was no evidence of predisposition is without substance. On June 1, Glassman first mentioned that there was "a fee in it for all of us" (R. 518–519), and on June 14 he reported that he had demanded $35,000 in escrow (R. 522). On June 20, he noted that other cases might present similar possibilities (R. 530–532). As for Gorin, he bragged to McCaffrey about killing other cases (R. 576–584). Similarly, Grillo indicated that he and Gorin had been working together before McCaffrey was assigned to the case (R. 635–638). There was thus ample evidence of predisposition.

Petitioners also argue that it was error for the trial judge to instruct that petitioners had to establish inducement by a preponderance of the evidence. Although we do not agree with the court of appeals' view (313 F. 2d at 653) that it is desirable to separate the burden of proof on the elements of entrapment, we do not believe that this issue warrants review of this case. In this case, as in *Lopez* v. *United States*, 373 U.S. 427, 436–437, "[s]ince the record does not disclose a sufficient showing that petitioner was induced to offer a bribe, we cannot conclude that he was prejudiced by the charge on burden of proof, even assuming that the burden called for was too great."

6. McCaffrey's conversations with petitioners on June 20 and thereafter were recorded either with a minifon recording device or with a radio transmitter and a separate recorder. (See, *e.g.*, R. 46–48.) These recordings were properly admitted into evidence under the authority of *Lopez* v. *United States*, 373 U.S. 427. As in *Lopez*, one of the parties to the conversation, McCaffrey, testified regarding his recollection of the conversations. The claim that State law was violated by the recording of McCaffrey's conversations at Glassman's office and at places other than the Internal Revenue Service offices is unsound. The Massachusetts statute prohibits eavesdropping "secretly or without the consent of either a sender or receiver" unless a court order is obtained. Mass. Gen. Laws, c. 272 (1963 Cum. Supp.), § 99. McCaffrey was a party to the conversations and was, there-

fore, a "sender or receiver" within the meaning of the statute. Since the word "secretly" has not been construed by any Massachusetts court to extend the statute's proection to cases in which one party consents to having the conversation overheard or participates in recording the conversation, there is no reason to read the statute as prohibiting the recordings made and used in this case.

7. On August 26, 1961, Glassman was arrested under an arrest warrant by an inspector of the Internal Revenue Service and a Deputy United States Marshal and taken to the office of the marshal. He was requested to put all his personal effects on the desk and to empty his wallet. The inspector noted that Glassman had left some papers in his wallet and asked to see them. When Glassman replied that they were personal papers and were unimportant, the inspector told him that he would like to see them anyway. Glassman then produced a paper with notations which appeared to represent the manner in which the money to be paid for fixing the Bergman tax case was to be divided. The notations were copied by the inspector, and the copy was introduced into evidence (R. 82–85, 88–89).

Petitioners claim (Pet. 32–38) that the copy of the paper should have been excluded because the paper itself was of evidentiary value only and, as such, was not subject to seizure incident to a lawful arrest. But since the paper listed the division of the money to be paid for execution of the illegal scheme, it bore the earmarks of a memorandum in furtherance of the conspiracy and was, therefore, an instrumen-

tality of the crime. Consequently, it was similar to the papers held admissible in *Marron* v. *United States*, 275 U.S. 192, and *Abel* v. *United States*, 362 U.S. 217.

8. Complaints as to various other trial rulings are without merit:

(a) Petitioners assert (Pet. 43–44) that the court should have granted them a severance primarily so that they would be able to use their codefendants as witnesses to support their defense of entrapment. But the entrapment defense was asserted by all petitioners, and each would have had to testify in his own behalf to establish the defense. Hence there was no prejudice in trying petitioners together. Moreover, the desire of one defendant to call codefendants as witnesses does not require a severance. See *Olmstead* v. *United States*, 19 F. 2d 842, 847–848 (C.A. 9), affirmed, 277 U.S. 438; *United States* v. *Berman*, 24 F.R.D. 26, 28 (S.D. N.Y.); *United States* v. *Van Allen*, 28 F.R.D. 329, 338–339 (S.D.N.Y.).

(b) Petitioners claim (Pet. 55–56) that the court erred in refusing their motion at trial (R. 405–406) to strike certain of the overt acts (2, 3, 9 and 10) alleged to have been committed in furtherance of the conspiracies charged in counts one and three. They contend that McCaffrey induced the commission of these particular acts. Assuming, *arguendo*, that these overt acts could not have constituted a basis for conviction, petitioners were not prejudiced by the court's failure to strike them. It is clear that the jury, which found that the substantive violation alleged in count two had been committed, based its

verdict on overt acts other than the challenged ones. By its verdict on count two, the jury demonstrated that it believed that money had been paid to McCaffrey as charged in the first overt act of counts one and three. See *Giardano* v. *United Stataes,* 251 F. 2d 109, 115 (C.A. 8), certiorari denied, 356 U.S. 973. Moreover, with respect to count three, the conspiracy with which Grillo was charged arose under 26 U.S.C. 7214(a)(4), a statute which is violated even without the commission of any overt acts.

(c) Petitioners' final contention (Pet. 56–57)—that it was error to disallow a defense inquiry as to whether McCaffrey was "anxious for the government to prevail"—clearly presents no question appropriate for review by this Court. The extent of McCaffrey's interest was obvious from his testimony, and the court had allowed extensive cross-examination of the witness (R. 119–401). In these circumstances, it was permissible for the court to bar a concluding question of this sort.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964